Supreme Court, U.S.
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No. 79-1601

In the Supreme Court
OF THE
United States

October Term, 1980

George Sumner, Warden of the California State Prison at San Quentin,
Petitioner,

vs.

Robert Mata,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

PETITION FOR CERTIORARI FILED APRIL 14, 1980
CERTIORARI GRANTED JULY 2, 1980

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 3, 1973--Conviction of first degree murder in violation of California Penal Code section 187 by jury in the Superior Court of the California, County of Kern.

July 5, 1973--Abstract of Judgment filed reflecting a sentence of life imprisonment.

August 4, 1975--Affirmance of the judgment of conviction by the California Court of Appeal, Fifth Appellate District, 5 Cr. 1735.

April 1, 1977--Petition for Writ of Habeas Corpus denied by the Superior Court of California, County of Marin.

August 2, 1977--Petition for Writ of Habeas Corpus denied by the California Court of Appeal, Fifth Appellate District.

November 14, 1977--Petition for Writ of Habeas Corpus denied by the California Supreme Court.

December 9, 1977--Petition for Writ of Habeas Corpus filed in United States District Court for the Northern District of California.

January 19, 1978--Order to Show Cause filed.

February 28, 1978--Return to the Order to Show Cause filed.

April 4, 1978--Traverse to the Return filed.

April 6, 1978--Hearing on Return held.

April 7, 1978--Declaration of Jamie Jacobs-May filed.

April 12, 1978--Supplemental Points and Authorities in Support of Petition for a Writ of Habeas Corpus filed.

May 23, 1978--Order denying Petition for Writ of Habeas Corpus filed.

May 23, 1978--Judgment filed.

June 21, 1978--Notice of Appeal filed.

July 25, 1978--Order granting petitioner's Application for Certificate of Probable Cause to Appeal and Proceed In Forma Pauperis filed.

September 11, 1978--Appellant Mata's Opening Brief filed in the United States Court of Appeals for the Ninth Circuit.

November 13, 1978--Appellee's Brief filed.

December 29, 1978--Appellant's Reply Brief filed.

August 15, 1979--Matter argued and submitted before Judges Ely, Sneed and Takasugi.

December 21, 1979--Opinion and judgment entered reversing the conviction and remanding to the District Court to hold the Petition in abeyance for 90 days within which time state prosecutors may initiate a new trial against appellant.

January 1, 1980--Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc filed.

January 31, 1980--Order denying rehearing and rejecting a rehearing en banc filed.

February 7, 1980--Mandate issued.

February 26, 1980--Appellee's motion to recall and stay mandate filed.

March 5, 1980--Appellee's motion denied.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN

No. CR-1735

The People of the State of California, Plaintiff, vs. SALVADOR VARGAS, DAVID GALLEGOS, and ROBERT MATA, Defendants and Appellants.

REPORTER'S TRANSCRIPT

Before Hon. P. R. Borton, Judge, Department 6, Bakersfield, California, June 11, 1973 through July 4, 1973.

Appearances:

For the Plaintiff:
Albert M. Leddy
District Attorney of Kern County

For Defendant Salvador Vargas:
Stephen M. Tauzer
Deputy Public Defender of Kern County

For Defendant David Gallegos:
Mr. Stanley Simrin
828 Chester Avenue
Bakersfield, California

For Defendant Robert Mata:
Mr. James T. Lanier
1408 - 18th Street
Bakersfield, California

[215] THE COURT: All right, Mr. McGillivray, you can open with your opening statement.

[223] The evidence will show that both J. Allen and Rigoberto Almengor had difficulty identifying the assailants.

[266] PAUL SCOTT CHILDRESS, called as a witness on behalf of the People, having been first duly sworn, took the stand and testified as follows:

[268] Q In what manner were you acquainted with Mr. Mata?

A The first time I met Mr. Mata was after I had bought some narcotics.

Q Was this in or out of the state prison?

A This was in the state prison.

Q Would you describe just how your contact with Mr. Mata came about?

A Well, I had bought this paper of heroin from a fellow named Gilbert Roybal.

Q Was he an inmate at the time?

A Yes, he was. And I didn't have the money right then when I bought it, and Gilbert said I should pay Mr. Mata for the paper.

Q Did you in fact give Mr. Mata some money instead of Mr. Roybal?

A Yes, I did.

Q Approximately how long before October 19th was that?

[269] A I would say three months.

* * *

Q Directing your attention specifically to October 19, 1972, Mr. Childress, can you tell us what you did on the morning of that day?

A Well, I got up at about 7:30, got ready to go to work, and I was supposed to be in the mess hall at 8:00, and I was in the mess hall by 8:00.

Q Now, what kind of work do you do?

A I worked utility crews, just general work in the kitchen.

Q Approximately how long did your work shift last that morning?

A Up until about 11:00.

Q What did you do next after finishing your morning work shift?

A I came directly back to the dorm.

[270] Q Back to your Dorm 8?

A Right, to my bed area.

Q Approximately how long did you stay in your bed area?

A I had a couple of cigarettes, took my shoes off, and layed down and slept for awhile. And I stayed there up until about 1:30, 2:00, until the officer woke me up.

Q Do you recall which officer it was?

A Yes, it was Officer Loomis, our dorm officer.

Q What happened after he woke you up?

A He woke me up about 1:30, and told me that the Education Office had called, and I was supposed to be at school at that time.

Q Were you regularly scheduled for school that afternoon?

A Yes, from one to 3:30 or 4:00. I am not sure of the exact hour, what it was.

Q Did you see where Mr. Loomis went after he woke you up?

A No. I just sat up on my bed, and I didn't pay no attention to him.

Q How long did you stay sitting up on your bed after you were awakened?

A I sat there about five or ten minutes, waking up.

Q And after you were sufficiently wakened up, what happened next?

A I woke up, and I was sitting there, and I was facing towards our bathroom in the dorm, and I noticed Mr. Gallegos [271] walked by my bed area.

[272] Q What is the next thing you either saw or did after Gallegos looked back over his shoulder and walked on?

A I was still sitting there, and on Bed 878, I think it was, there was two inmates talking.

Q Did you know either one of them?

A I knew one of them.

Q What did you know him by?

A I just knew him by his last name, was Allen.

Q What happened after you noticed the two inmates there?

A Well, the inmate Allen was talking to was sitting on the end of his bunk, and as I looked toward that bunk, he turned around and was facing me, looking in my direction. About that time I got up and went to the bathroom, and washed up.

Q Did you notice, Mr. Childress, where Mr. Gallegos [273] went after he passed you or looked over his shoulder?

A No, I didn't see him.

Q Did you notice anybody in particular as you went from your bunk to the bathroom other than Mr. Allen and the man with him?

A Yes, I did. As I was going toward the bathroom over by our exit door, there was a bulletin board, and I noticed Mr. Mata standing by the bulletin board.

Q Are you able to tell us from your recollection whether or not there were any other persons in the vicinity at that time and whether you recognized them or not?

A No, there wasn't anybody else there in the vicinity.

Q Approximately how long did you spend in the bathroom?

A I was there long enough to brush my teeth and wash up.

Q About how long does that take you?

A A few minutes. Five minutes, I guess.

Q After you finished your washing up activities, what did you do next?

A Well, I was looking in the mirror, and I decided I had better shave before I go to school, and at that time I didn't have any shaving cream in my locker, and I walked down to the far end of our dorm, and asked an inmate if I could borrow some of his shaving cream.

Q Do you recall which inmate that was?

A I think it was John Marsias, but I am not positive.

Q When you say the far end of the dorm, are you again referring to what you call the back of the dorm?

[274] A Yes, I am.

Q Is it correct there are four rows of bunks that go down the dorm and an aisle between each two rows?

A That is true.

Q Did you go down your own aisle where your own bunk was or the other aisle?

A My own aisle.

Q When you went down to try to borrow some shaving cream, do you recall whether or not Mr. Allen and the other inmate was still in Mr. Allen's bunk?

A No, I don't.

Q What happened when you tried to borrow some shaving cream?

A He told me he didn't have any, and so I just turned around and walked back to the bathroom.

Q And since you had not obtained the shaving cream, why did you walk back to the bathroom?

A Well, I had left my soap dish and towel and toothpaste in the bathroom.

Q When you went back into the bathroom to get those items, did you notice anybody in particular up in the vicinity of the front of the dorm?

A No, I didn't pay any attention to it.

Q Now, how long were you in the bathroom at that time?

A Not very long. Just long enough to pick up my soap dish and stuff, and I started back out toward my bunk area.

Q Did you notice anything or anybody as you approached the exit of the bathroom?

[275] A Yes. I was about half way out of the bathroom when I noticed the inmate that had been talking to Mr. Allen had just walked by the bathroom going towards the exit door.

Q At that time were you still actually in the bathroom? Or had you gone through the door?

A No, I was still in the bathroom when I noticed him.

Q What happened next that you recall?

A Well, I just headed back towards my bunk area, and as soon as I got out of the bathroom area, I heard a scuffling going on to my right.

Q When you heard that scuffling -- strike that.

Is it correct that there is a low wall that goes right down the center of the dorm?

A Yes.

Q And at the end of that wall toward the offices or toward the front of the dorm, there is a low wall that crosses it like a "T"? Is that correct?

A Yes, sir.

Q At the time you heard the scuffling you just mentioned, were you past that "T" that I just described, heading down to your bunk, or were you still in the area in front of the bathroom?

A I had just come out of the bathroom a couple of steps.

Q What did you do when you heard this scuffle?

A I turned to my right, and I observed four inmates. I thought they were fighting at the time.

Q Would you describe with a little more particularity [276] what they appeared to be doing as you walked out?

A There was one inmate in the middle, and three inmates were around him, and the inmate in the middle had his arms up.

Q How high? Can you demonstrate for us?

A About this high (indicating).

Q You are a little bit --about a foot above the shoulder?

A You want me to stand up?

MR. MCGILLIVRAY: Okay.

THE WITNESS: Like this here (indicating) with his hands closed like this here, and the other three inmates were moving in on him at that time.

Q Did you see them do anything with their arms at that time?

A Yes, they were going in with their arms like a thrusting motion.

Q When you demonstrated, you moved your hands straight out and pulled them back. Did you mean to do that deliberately or was it a swinging motion?

A No, that wasn't deliberate.

Q Having observed that what you have just described to us, what was your next impression what was happening there?

A I thought they were fighting, and then I noticed a small silver knife fall to the floor, and then I snapped to as to what was happening at the same time.

Q And you saw or you heard it?

A I saw it hit the ground.

[277] Q Did it make any sound as it hit, as you recall?

A Not as I recall. I just seen it fall.

[279] Q Mr. Childress, were you able to recognize any of the persons involved in this scuffle with Mr. Arias?

A Yes, I was.

Q And can you tell us who they were, please?

A The three gentlemen seated behind their lawyers.

[283] Q Incidentally, did you know either of the two defendants that you have identified as having had contact with in the past by any nickname?

A Yes, I have.

Q Which one or both?

A Mr. Mata. I knew him by the nickname "Biggs".

Q Biggs?

A Right.

Q On the day that this incidence occurred, did you report what you had seen to anyone?

A No, I didn't.

Q When was the first time that you reported this to someone?

A The following day between 2:30 and three, I think it was.

Q Did anything happen to you between the time of the incident and the time you reported it that had an influence on your reporting of the incident?

A Yes, I was sitting on my bed the following day. It must have been about 12:30 or 1:00. And a couple of inmates I have never spoken to before, they walked up to my bunk, and I had some magazines on top of my bunk, and these were Chicano inmates, and they asked me if they could read my magazines. And at that time I told them, "Sure. Go ahead", but I never talked to them before then, and that was just [284] kind of didn't seem right to me.

Q Did anything else happen later in the day that also had an influence on you?

A Later in the day?

Q Yes, immediately before you made your report?

A Oh, yes. This was about 3:30 or 4:00.

MR. MCGILLIVRAY: Okay.

THE WITNESS: I was walking up towards control, and there was three or four inmates that were behind me at the time. I'm not sure exactly who they were, and when I got to control, two officers stopped me and asked me what I wanted, and I told them I would like to talk to whoever was in charge. And Sergeant Mills had just came out of his office, and he took me into his office.

Q Is that an office that faces onto the yards outside the dorm?

A Yes.

Q Did you go into Sergeant Mills' office?

A Yes, I did.

Q And what happened next?

A I explained to him what I had seen the following day.

Q The following day?

A I mean the day before.

Q Did you tell him who the inmates were that were involved?

A Yes, I did. I told him what I knew their names by.

Q Did you know any of their names at the time that you reported to him?

[285] A Not their last names, no.

Q Did you report them by nickname, anything like that?

A Yes.

Q Tell us what you told him.

A Well, I sat down and --

Q Excuse me. Let me limit my question. I am not asking you to relate the whole thing, but as far as identifying the people, tell us what you told him.

A Yes. I told him what dorm I thought they lived in.

Q Which dorm?

A I told him it was Dorm 6, but it was really Dorm 5 they lived in, but I just mixed the numbers up on the dorm.

Q When you told him Dorm 6, did you have Dorm 5 in mind?

A Yes, I did.

Q What else did you tell him as far as identification is concerned?

A I just told him the nickname I knew them by.

Q What was it?

A One was "Biggs" and David's first name. That was all I knew of Mr. Gallegos name.

Q Were any additional steps taken to get the persons identified while you were with Sergeant Mills?

A Yes, he brought in a Rollodex of pictures of inmates and had me go through them.

Q Is this a circular file sort of?

A Yes, it is.

Q Can you give us a rough estimate of how many [286] photographs would have been on

that Rollodex?

A Two hundred.

Q Were you able to pick anybody's picture out of that as being the person you had seen involved in the scuffle?

A Well, first, he brought Dorm 6's -- photographs of Dorm 6, and that's when I understood that I made the mistake on the dorm.

Q Did you identify anybody from Dorm 6 photographs?

A No, I did not.

Q What happened next?

A Then he went and asked me, "Are you thinking of Dorm 5?" And I explained what dorm I was talking about, and he said, "That's Dorm 5". And he went and got some more photographs, and I went through those, and picked out two inmates -- Mata and Vargas.

Q Did you see Mr. Gallegos' portrayal

in those pictures?

A No, I had to go through some more photographs.

Q Were some more photos brought -- would you tell us how that happened?

A I wasn't sure what dorm he lived in, and they just brought a whole bunch of photos, and I identified him. I had to go through them all, and when I came to his, I picked it out.

Q When you identified these three persons from the various photographs you were shown, did you have any doubt about your identification of them?

A No, I did not.

[287] Q Do you have any doubt now?

A No.

Q Looking at these men now, do any of them appear to be any different or have any different appearance than when you saw them?

A Yes.

Q Would you describe which one or ones, and what the differences are?

A Well, Mr. Mata had a mustache that day, and Mr. Gallegos didn't.

MR. LANIER: I didn't hear, your Honor. Mr. Gallegos didn't what?

THE WITNESS: Didn't have a mustache.

[289] Q Now, after you were placed in segregation, did you see also in segregation any of the three defendants?

A Yes. I seen all three of them.

Q Did you have any conversation with any one of them relating to this incident that you've described?

A Just one.

Q Which one?

A That was David Gallegos.

[290] Q Okay. Would you tell us, please, as best you can recall, what you said and what he said in the conversation that related to the incident.

[291] A Yes. He asked me if I was ratting on this thing.

Q What did you say?

A I told him no, I wasn't, that I was in school that day, and he said, "well then, I'm not going to say anything about it. I'll just let it drop."

[302] Q Now, during the time you watched Mr. Arias, the victim, at Mr. Allen's bed, did you see anybody else come to that bed?

A No.

Q You didn't see Mr. Almengor come to that bed, did you?

A No, I didn't.

Q As a matter of fact, you didn't see Mr. Almengor anywhere that day, from the time you woke up until the time you got back to your bed after all this scuffling took place.

A That's correct.

Q Now, when Mr. Arias was walking in front of you, do you know where Mr. Allen was?

A No, I don't.

Q Didn't see him at that time at all.

A No, I didn't.

Q And you stood there and watched the scuffling for about ten or fifteen seconds, didn't you?

A That's correct.

Q You had a good look at it. You didn't just glance [303] over for a second and turn you head away.

A No, I didn't.

Q Just stood there for a while and you stared to see what was going on.

A Yes.

Q You didn't see Mr. Allen?

A No, I didn't.

Q Didn't see Mr. Almengor.

A No.

[327] Q Mr. Childress, I believe when we broke for lunch, you were describing the relative positions of the three men you say were involved with Mr. Arias, and as you have

outlined them on the chart before you. Is that correct?

A That is correct.

Q And is it your testimony that these three men stood in positions -- basically in the positions -- that you have marked here during the whole scuffle -- during the whole time you stood there?

A That is correct.

Q You never at any time saw them change positions, one with another?

A No.

Q How long did you stand there in total?

A About ten or fifteen seconds.

Q Just a few seconds?

A Uh-huh.

[328] Q And during that fifteen seconds, it is your testimony that is the only time that you saw Mr. Vargas or the man you claim to be Mr. Vargas in the dorm that day?

A That is correct.

Q And during that whole ten or fifteen seconds, Mr. Arias, the victim was more or less between you and Mr. Vargas?

A That is correct.

Q Now, was there anyone else standing between you in the bathroom door and this scuffle that was going on?

A No, there wasn't.

Q No one walked in that area at any time that you were there?

A No.

Q And you know Mr. Almengor, and you know Mr. Allen?

A Yes, I do.

Q You didn't see either one of them in the area?

A No.

[330] Q You say when you stood there, during most of the time you saw what appeared to you to be a fist fight? Is that correct?

A That is correct.

Q And you say you saw the three

attackers lunging or striking at Mr. Arias?

A That is correct.

Q Is it your testimony that you didn't see any knives at that time?

A That is correct.

Q And in fact, you didn't see any knives at all except for the one that fell on the floor?

A That is correct.

Q That is the one you described here as Exhibit 8?

A Yes.

Q How far were you from this scuffle?

A About fifteen feet, I guess.

Q Did you ever get any closer?

A No, I did not.

Q And did you ever see this knife before that fell on the floor?

A No.

Q But you actually saw it there on the floor?

A Yes, I did.

[346] Q So I understand you correctly, Mr. Childress, did you see them run out the door?

A I seen somebody run out the door.

Q When did you see them run out the door?

A When did I see them run out the door? After I had gotten back to my bunk and put my stuff away, and stood up.

Q Some two or three minutes later?

A Yes.

[365] RIGOBERTO ALMENGOR, called, sworn and examined as a witness, testifies as follows:

[366] Q Are you presently on parole from your commitment to Tehachapi?

A Yes, sir, I am.

[372] Q Mr. Almengor, at the time on October 19th when you went down to Jay Allen's bunk area and the people there had some coffee, did you have some conversation with Mr. Allen and Yogi?

A Yes, I did.

Q About how long did that conversation last?

A About 20 minutes, maybe 15.

Q Were you down there the whole time during that 15 or 20 minutes?

A Yes, Sir, I was.

Q Okay. Where did you go next after that conversation?

A I went back to my bed area to pick up my glasses.

Q Okay. What happened next after you went back to get your glasses?

A I started going in the t.v. area and as I was going to the t.v. area, they called out on the loudspeaker, 'all new arrivals report to the laundry room' and he was a new arrival.

Q Okay. How far were you toward the t.v. room? [373] Had you left the bunk area yet?

A I was already getting close to their bunk areas, almost a step away.

Q Okay. What happened atthat point after the announcement came over the loud-speaker?

A That's when I got an invitation from Jay Allen telling me if I would like to go with him to the laundry room, with him and his friend.

Q Okay, did you decide to go with him?

A At first I hesitated and kind of took about two more steps, and I told them I guess it's all right, and I decided to go with them.

Q Okay. What happened next?

A Next. Then Jay Allen is grabbing his coat at the time.

Q Excuse me?

A Jay Allen started grabbing his coat.

Q Grabbing his coat.

A Yes, and we started walking away, me and Mr. Arias, and Jay Allen is about two steps behind Mr. Arias, buttoning up his coat.

Q Where were you?

A By then, me and Mr. Arias was by the water fountain and we was passing the water fountain.

Q Were you and Mr. Arias side by side, or was one ahead of the other, or what?

[374] A Me and Mr. Arias were almost side by side.

Q Okay. And approximately how close to him were you?

A Almost even.

Q Okay. Let me rephrase that question. If this table was Mr. Arias, how far away from him were you? Were you right next to him, or a little bit away, or what?

A I was just about so far from him.

Q About like where I'm away from the table?

A Yes, because when we started walking out the door, we just closed up together.

THE COURT: For the record, "like I am" is approximately three feet.

MR. McGILLIVRAY: Q Now, did you notice anybody standing anywhere in that area at the time that you were walking past the t.v. entrance, and so forth?

A Yes, sir.

Q And where were these people that you noticed?

A Two of them were at the bulletin board, and one of them was by the wall that comes out right next to the bulletin board.

Q Is that a wall that's only about four feet high or so?

A Yes, sir.

Q Okay. Do you recognize any of the people that were standing there, those two at the bulletin board and one at the little wall? Do you recognize any of them in the courtroom here today?

[375] A Yes.

Q Would you tell us which ones you recognize?

A The one in the yellow shirt and the one on the right hand side sitting back.

Q The fartherest away from you?

A Yes.

Q Where was the one in the yellow shirt?

A The one in the yellow shirt was on the right hand side of the bulletin board, and the other one in the gray coat was on the left hand side of the bulletin board as you were walking out the door.

THE COURT: The record will again show that the yellow shirt is Mr. Mata, and that the gray coat on the right, as was stated, Mr. Gallegos.

MR. McGILLIVRAY: Q Now, did these persons have their -- which way were they facing? Were they looking at the bulletin board, or the other way?

A They were pretending like they were lokking at the bulletin board, like they were

reading papers on the bulletin board. They also had their hands pointing at the bulletin board.

Q What was the other person doing at the wall?

A He had one of his hand inside his jacket and the other hand on the wall.

Q Which way was he facing?

A Facing the dorm area.

[376] Q Out into the bunk area?

A Yes.

Q Do you recall what kind of clothing these individuals were wearing?

A Yes, sir.

Q And what was that?

A They were wearing a regular state pant issue and a regular state jacket issue, the levi jacket issue and beanie caps.

Q Did all three of them have caps?

A Yes, they did.

Q Did you notice whether they had anything on their hands?

A Not at the time while they were standing.

Q Okay. Now, would you tell us what happened as you and Mr. Arias and Mr. Allen behind you approached the door?

A As we approached the door, well all three of them -- the two at the bulletin board turned around real fast, and as they turned around real fast, I took two steps away from Mr. Arias, stepping back from him. [377] Okay. You told us these two men at the bulletin board turned around fast, and you went back a few steps. What happened next that you saw?

A I saw them approach Mr. Arias, and as they approached Mr. Arias, I noticed they were hitting on him, but yet I hadn't noticed that they were stabbing him or killing him or nothing. I just thought it was a physical fight at the time.

Q What happened next?

A So, I continued looking at them, but the guy at the wall that was at the wall, he had one of his shoulders turned around, and as I was looking at him, I seen him pull a knife out of his back.

[378] Q Pull the knife out of whose back?

A He pulled a knife out of Mr. Arias' back.

A Can you describe this knife for us?

A Most likely I can.

Q Could you give us a good try, please.

A Yes. I can give a try. It was a long knife, about this long. It looked like a long butcher knife, one of the butcher knives they have in a butcher shop. Long and pointed.

MR. LANIER: For the record, I think he was indicating about eighteen inches.

* * *

Q Is this in any way similar to the knife?

[379] A Yes, it's similar to the knife that I seen come out of his back.

Q Okay. What happened next, Mr. Almengor, that you either saw or that you did after you saw the man, that had been standing by the little wall, pull the knife out?

A I looked at Jay Allen to see what he was going to do, and as I seen Jay Allen, I seen that he was attending to nothing; that he wasn't going to do nothing, you know.

Q Where was he in relation to Mr. Arias?

A He was about two steps away from the fight, and so I started to approach the fight when one of the inmates that was -- that was stabbing Mr. Arias seen that I was approaching him, and he pulled away from Mr. Arias and did like a sloop turn, and then all that left me, I seen the one that was in the middle, and he turns around and looks at me, and I was going to approach the one that's

stabbing him in the stomach, but only, I seen -- with the sight of my eye -- that the other one that slooped and pulled away from Mr. Arias started coming at me.

Q Okay. Let me interrupt you here. Now, can you tell us which one of them it was, that as you say, slooped away from Mr. Arias and was coming towards you?

A Yes, sir. It was the one in the yellow shirt.

Q And which ws the one that you referred to as stabbing him in the stomach?

A That one in the gray coat, sir.

Q Now, did you actually see a knife going into his [380] stomach, or were you seeing strokes?

A No. I was looking at strokes, stroking him in the stomach.

Q Okay. Mr. Almengor, I'm going to show you Exhibit number 8 and ask you if this appears to resemble the knife that you saw in the hands of the man with the yellow shirt?

A Yes, sir.

Q Again, you can't be positive this is the one. Is that correct?

A No, sir, but it was a small one like that one.

Q All right. What happened when the man in the yellow shirt, Mr. Mata, came at you?

A When he came at me, well, immediately I only attended to what I knew was right, which I attacked him, too.

Q Did you have any weapon?

A No, sir. I didn't have no weapon.

Q What did you attack him with?

A I attacked him with my hands.

Q Okay. Would you describe what took place then between you and Mr. Mata?

A As soon as I seen Mr. Mata rushing me with a knife, I threw a small kick at Mr. Mata, at his knife, trying to throw it off his hands, or just so it won't, you know, stick me with it, and I seen he pulled down

his knife, you know, just like off balance in his hand, a little, and I attacked him in the middle and I pushed him all the way to the door [381] just in a straight fist to fist fight.

Q Are you saying all the way to the door, are you referring to the door that goes out of the dorm?

A Yes, sir.

Q How close to the wall did you get?

A We came real close to the wall, cause as we came to the wall, I even hit my elbows on my right hand as I'm swinging at Mr. Mata.

Q Okay. About how long did you struggle with Mr. Mata?

A Just a few seconds, I say, and then I backed off Mr. Mata and we stook there looking at each other.

Q Okay. Were you able to see what Mr. Arias and Mr. Gallegos and the other man were doing at that time?

A Yes, sir. They were still stabbing Mr. Arias. At the time I was fighting with Mata, when I stopped I heard a jingling sound on the floor, which was -- the one in the gray coat's knife that fell down. It fell out of his hand, or either broke. I don't know what, but as I looked down at the floor, I seen his knife on the floor close to in between Mr. Arias' legs, and I was going to go for it and pick it up, but I decided that I didn't need no knife.

Q Mr. Almengor, I'll show you now what we have had marked as Exhibit number 9 -- or 6. Which is it, Mr. Clerk?

THE CLERK: That's number 9.

MR. McGILLIVRAY: Q Okay, our Exhibit numbe 9, and I'll ask you whether or not this appears to resemble what you saw [382] fall to the floor.

A It was similar to that right there, yes.

Q Again, you cannot be sure --

A I cannot be positively, you know, sure that that is, you know, the one on the floor, because I didn't pick it up, but it looks most likely to be the one.

Q Now, what happened next that you can recall after you saw that blade -- that part of the knife fall to the floor?

A When I saw part of the knife fall to the floor, then I just look at -- I looked at Mr. Mata again in the face, you know, and like, I gave him a motion of sign that, you know, that I didn't want to have nothing to do with it, see. It's none of my business.

Q How far away from you was he at that time?

A At that time?

Q Yes. When you made the motion.

A He was -- he was about where that speaker right there is to that white bulletin board, that middle speaker.

Q From here over to here?

A Maybe a step closer to the bulletin board.

Q About from where I am now?

A About right there, yes. About right there.

Q Approximately six feet?

A Yes, about there.

THE COURT: Pretty close.

MR. McGILLIVRAY: Q Could you stand up right where you [383] are, Mr. Almengor, and show us what kind of a motion you made to Mr. Mata?

A As me and Mr. Mata were looking at each other, I just like gave him a motion that I didn't want, you know, I didn't want to have nothing to do with it, so I just went like this to him and started backing off, and he seemed to understand, so he turned around and ran out the door, and as he was running out the door, the others followed him, the one in the middle and then the third one, the tallest one.

Q When they ran out the door, did they have to run past you?

A Yes. They had to run past me.

Q All right. At the time they were running out the door, did you notice what was going on with Mr. Arias and Mr. Allen?

A By then I seen Mr. Allen putting down Mr. Arias. He caught him, you know, as he was -- before he fell, and he was catching him and laying him down. That's when I went, also, to Mr. Arias. When I got there, when I got through stepping to where he was at, Mr. Jay Allen had already laid Mr. Arias down on the ground. I kneeled down to see. I didn't know what to do, you know, so I kneeled down to touch Mr. Arias to see if he was dead, and I could hear all the breath coming out of Mr. Arias, and at the time I got blood on my pants.

[385] A When I saw Mr. Loomis to do that and telling everybody, 'back to your bed areas,' I knew that that dorm would be

crowded, you know, with officers just any minute now, you know, so immediately I -- I did exactly what he said and I went back to my bed area and changed. As I was walking back to my bed area, Jay Allen's brother, Fred Allen, tells me that I have blood on my pants, so that's how I knew I had blood on my pants, cause I didn't know that I had blood on my pants. So immediately I got back to my bed area and change in a full set of different clothes, state clothes.

Q You took off the clothes that had the blood on them.

A And took off my state shoes and put on the regular street shoes that I had at that time there in Tehachapi, but [386] all the rest is state issue, and I threw my clothes a few bunks away from my bunk.

Q Now, what happened after you discarded your clothes? What did you do?

A Well, I just, you know, I stood calm, and I asked if I could use the rest-

room, and I went into the restroom and washed my hands, cause they told everybody to stay in their bunk areas, so I pretended to have went in the restroom, and I washed my hands where I could see there was blood.

Q Was there blood on your hands?

A Yes, where I touched Mr. Arias.

Q What did you do after you washed your hands?

A I came back to my bed area and it was crowded with officers at the time but Jay Allen was still attending to Mr. Arias, which they took him immediately, so I was the only one left there in the dorm area, so now they shake the dorm down to see if they could find some of the parties that were involved, to see if they could find anyone that has blood on them.

Q What do you mean by shake down?

A To check your clothes, your locker, to see if there's any knives, any kind of

weapon in your locker, or any blood -- anything that might lead to any kind of evidence.

Q In other words, search the dormitory to see if they could find anything that might help them investigate?

A Yes, sir.

[387] Q Okay. Did they shake you down and shake your bunk down?

A Yes, sir.

Q And what happened at that time?

A At that time they passed me through. They didn't find nothing wrong with me. They passed all the way through on the first shake down, and as -- they kept walking around. One of the officers -- they didn't even find the pants. They didn't pay no attention to the pants on the floor in the middle of the aisle. They just figured they were there -- but one of the officers just kep walking around, and he noticed that, you know, some pants were on the aisle, so he picked them up, and as he picked them up, he seen that

they were full of blood, so they figured that one of the involving parties was still in that dorm.

Q What did they do then?

A So then they decided to throw another shake down. This time to throw down a skin shake down to see if anybody's gots any cuts on their body, or anything, or any blood on their bodies. So they throw this skin shake down down and also they don't find nothing, but now they go to the pants. Now they want to know who these pants fit in that dorm.

Q What do they do with the pants to find out?

A They get the pants. They come back later with the pants, and wherever he found -- when he picked them up, he marked the bed area where he found --straight to the bed area [388] where he found them, and took them to the officers and discussed it with the other officers and came back.

Q That was just a couple of bunks down from your bunk?

A Yes, sir. About two and a half bunks, in the middle of the third bunk away from mine. So they tried them on eight guys in front of my bunk area down to where they were at. Eight guys that way, and they tried them on eight guys this way, and now then they tried them on eight guys that were in my bed area in the row I'm in, and eight guys this way, and when they came to mine, they fitted me, but only -- they tried me last.

Q You were to last one they got to?

A Cause the pants read out 32-34.

Q Were they tailored for you?

A Yes. I had them tailor made for me, and all my clothes were made that way, and they only fitted me in the whole dorm, so they knew it was me.

[390] THE WITNESS: Me and Mr. Arias are approaching the door to go out the dorm, and Mr. Arias is looking down, sort of down,

speaking to me, and at the time there is three -- two people at the bulletin board and one at the wall. As soon as they turn around real rapidly in a fast movement, I took two steps back, like this -- about two and a half steps back, and I just stood there, and looked, you know, to see why they took that fast movement --why they did that fast movement.

[391] Q Okay. Now, at that point, did Mr. Arias put his hands up?

A Yes, at that point Mr. Arias looked right away up like that, too.

Q Now, when these people got to Mr. Arias -- the three men -- could you demonstrate for us where each one was? You told us one of them was Mr. Mata -- the man in the yellow shirt?

A Yes, sir.

Q Using me as Mr. Arias, demonstrate for us how you saw Mr. Mata, to begin with.

A Mr. Mata is at the bulletin board, looking up, sort of like this, with his hand like this (indicating) at the bulletin board. And he turned round rapidly, and he attacked Mr. Arias, and he was like right here beside him.

Q He was on Mr. Arias' right side?

A Yes, on Mr. Arias' right side, right here.

Q And then he would have been reasonably close to you? Is that correct?

A Yes, uh-huh.

Q Now, what about Mr. Gallegos?

A Mr. Gallegos turned around in the same fashion -- turned around like this, and went at him in the middle of his stomach, and he slooped down like this, and he was stroking him, like this, down here.

Q What about the third person?

A The third persons was at the wall. There was just a wall like this, and he had his hand up. And he had his hand [392] like

this, and he also turned around, but he grabbed him like this, and he stooped him over like this, and at that time already Mr. Arias had his hands up, like this (indicating), saying, "No", and "No", and this person right here stabbed him in the back.

Q Is that when you saw the knife come out of the back?

A Yes, because I was hearing body contact, and looking at him, but I still don't know where they were stabbing him until he pulled it out of his back. That's when I seen him. This guy up here is looking at me because I'm about right here, and I'm looking at this one.

Q You are looking over Mr. Arias' shoulder at him?

A Yes, uh-huh. That's all I could see at the time. And right now I can't see these other two right here. I didn't know here was two more there, you know. I could

see only one stabbing him in his back and pulling the knife out of him in the back.

Q Now, you described for us that Mr. Mata, I think you said, slooped off?

A Yes.

Q Could you described what motions he made or show us rather?

A While that motion is taking place, and back here, looking at the young man stabbing him in the back. And I realize what's going on at the time. And so I think at least I could help him and take one of the men off him, which I looked at Mr. J. Allen on this side after I have seen this [393] young man stabbing him in the back, and I look at J. Allen, and I see J. Allen is not going to attempt nothing, and I see that, you know, and that I try to move in, you know. While I'm moving in to get Mr. Mata down, but he doesn't go in because that guy that is stabbing him in the back throws a stroke at

Mr. J. Allen, you know, and as I move in, Mr. Richard Mata sloops over like this.

Q Let's make believe here you are Mr. Mata. Would you show us --

A Mr. Mata is stabbing him like this.

Q And you are moving in --

A And he is stroking him, and looking at me like this to see if I am going to move in or what, you know, as soon as he see I started to move in, he sloops over like this, and he keeps looking at me, and he sees that -- I might be -- David Gallegos, because David Gallegos looks at me, you know.

Q At that point could you see David Gallegos?

A Yes, because David Gallegos was like this, and he just looked at me to see if I am approaching. But at that time Mr. Mata then, you know, he took -- sloops around sideways like this. He went back, stroking at me, like that.

Q Is that when you and he started to struggle?

A Yes. I didn't attempt to do nothing else because I seen him coming at me, like this, and so I just went at him, like this, turned around there, and we were fighting all the way up to the dorm.

Q You told us you actually hit your elbow on the wall?

A Yes. We went all the way to the door fighting, and [394] I hit my elbow on the wall. The door -- the wall, that would be about right here. We fought all the way up to here, and the door would be about right here, and I hit my elbow on the wall because wer were so close to the office wall.

[396] Mr. Almengor, when we left off your testimony Friday, you had just described how they found that you may have been a witness to this thing because the trousers that they found fit you. After they found that out, that it was your clothes that were there on

the floor, did you have an interview with correctional officers and Detective Higgins from the Sheriff's Office?

A Not right away, no. At first I was still making my mind up if I was, you know, going to co-operate with them. And they left me in the office for a long time, and took photographs of where the blood stain was at on my arm, my right arm, and had me keep, you know, my arm like that until all the photographs, and they took some alcohol with cotton on it, and took the blood off my arm to show that, you know, there was blood on my arm, and then finally, Lieutenant King talked to me. You know, he was there, talking to me, and I told him if he would like, you know, I would be more than glad to give them my full co-operation, you know, if he would like to go through any hassles or anything further. I told him, "I would be glad to co-operate with you and give you my

full co-operation, if you have to talk", and he took me to the office.

Q After that did you have an interview or a conversation with Lieutenant King?

[397] Q During the course of that interview, were you shown any pictures to try to identify as the pictures of the people you had seen attacking Mr. Arias?

A Yes, sir, I was.

Q Could you describe what kind of pictures and how many were shown at that time?

A I asked to be shown all the Mexican -- all the Mexican population on that side of the fence.

Q That would be on the medium side?

A Yes, sir.

[404] Q Looking at these three defendants in court today, is there any one of them or two of them that you are positive that they were involved in this?

A Yes, sir. There is only two of them I am positively sure they are the ones.

Q And which two are those?

A Mr. David Gallegos and Mr. Robert Mata.

[415] A Well, I wasn't really noticing if there was anybody else around. My attention was if I seen any Mexican guys inside the dorm because that's the real danger I had my eyes on.

[420] Q BY MR. TAUZER: Now, you were shown pictures on the 19th of October, the day that this incident happened, and you picked out a picture of Bogus Pete, Pete Nunez? Is that correct?

A Yes, sir.

Q And you described him to the prison officials as tall, dark, Indian-looking?

A Yes.

Q Which one of these three men did you say that he looked like? Which one of these three attackers?

A The tall one.

[424] A Yes, sir.

Q Is there any difference between that picture and the way Mr. Vargas looks in person?

A Yes, sir, there is.

Q Is there anything about that picture that caused you to be confused about your identification?

A Yes, sir. His dark complexion, and I didn't know the height of Mr. Vargas, what he looked like, you know, until I seen him one day in the shower area.

Q In other words, you couldn't tell the height of the man from looking at that picture?

A Yes, sir, I couldn't tell the height of the man looking at the pictures.

Q And the complexion looks different than Mr. Vargas looks in person?

A Yes, he looks much darker right here.

Q He looks darker in the picture?

A Yes, the picture is black and white.

[433] Q Isn't it a fact that before you changed your mind about the gentleman in the upper left hand corner, you were advised by the police officers that he was outside of the institution that day?

A Yes, sir.

Q And before they told you that, you were fairly certain he was the fellow who was at the wall, aren't you?

A No. I wasn't positive sir.

Q Well, were you fairly certain, Mr. Almengor?

A I said out of these eight pictures, these three or four pictures, one out of them, that these three pictures fit you know, that guy, you know.

[437] Q And that day, you didn't identify any of the photographs except a possible identification of Mr. Vargas. Isn't that right?

A Not positive, sir. I never made a positive identification. I told them that until I see the men, I will be able to give a full positive identification.

* * *

Q Now, when you gave that tape recorded statement, didn't you say that when you first saw these three people, they were looking away from you, two at the bulletin board and one into the dorm? Do you remember saying that?

A Yes. One into the dorm.

[445] "Question: Did you at any time see them take Mr. Mata [446] and Mr. Gallegos and Mr. Vargas out of there together?

Answer: Yes, sir. One time.

Question: They took the three of them out together.

Answer: Yes, sir.

Question: And then brought them back?

Answer: And then brought them back.

Question: Was it after this that you looked at some pictures and made some identification?

Answer: Yes, sir. They took them out to take their pictures.

Question: Did you know that?

Answer: Yes, I knew that."

Q Do you remember testifying --

A I knew them after I seen them pictures, but I didn't know who they were. I just seen three persons. That's why I said yes, I seen them take them out, but I didn't know them. I hadn't seen their faces. That's why, as soon as I seen Mr. Vargas' fact in the shower, right away I corrected myself and said that that is not him, and if I had known anybody else was not the one, I would have also corrected myself in that area.

Q You did see them take Mr. Gallegos out?

A I did see Mr. Gallegos.

Q And you knew he was going to get his picture taken?

A Yes, sir, and I did know that he was one of them.

[449] MR. SIMRIN: Q Mr. Almengor, do you want to tell the court why you were transferred from the minimum side to the medium side?

A Yes, sir. There was a blue rag on my bed, a rag of blue on my bed.

Q And was that the first time that that had happened?

A No, sir. It had had happened before, sir.

Q As a matter of fact, you had been caught glue sniffing three times, had you not?

A Yes. Two other times, and at that time I finally told them to transfer to the other side, because my brother was also there and I didn't want them to bring any attention to my brother.

Q And you had been glue sniffing since you were eight years old?

A No, I haven't been since then. I was back at then. Okay?

Q I see. Now, at the time this scuffling took place, were you wearing your glasses, Mr. Almengor?

[450] A No, sir. Like I am right now.

Q And you are nearsighted, are you not?

A Yes, sir.

[457] Q Now, when you identified the photographs on October 30th, when you first made the identification of Mr. Gallegos, didn't you say then that you had previously correctly identified Mr. Vargas?

A No, sir. Not positive. I never made a positive identification. I told Lt. King 'when I see the man before me present at the preliminary, I'll be able to give you a full identification, unless you want to show me a line up'.

[465] Q Mr. Almengor, you had been taken from the barracks or the dorm after a skin search, hadn't you?

A Yes.

Q And they had found blood on you, hadn't they?

A Yes.

Q And they took you over to the office to do a little further interrogation, did they not?

A Yes, sir.

Q You were a suspect in the murder at the time? Correct?

A Yes, sir.

[466] Q Isn't it a fact, Mr. Almengor, that you only picked out four pictures as persons similar to the one who were involved in this crime?

A No, sir. I picked out about eight of them, sir, not being positively, just move likely for them to be the ones that fit, but four of them were one of the closest.

Q Well, that is the four you picked, saying they were the closest to the ones involved?

A Yes, sir.

MR. LANIER: Your honor, I would like to pass this to the jury.

THE COURT: All right.

(Exhibit passed to jury.)

Q (By Mr. Lanier) Mr. Almengor, when you selected these four pictures, you were trying your best to prove that you didn't commit this crime, weren't you?

A Well, not only that. I knew that I didn't commit it.

[467] Q But you had to prove it to them, didn't you?

A No, I didn't have to prove it to them because everybody in the dorm knew that I didn't do it.

Q Mr. Almengor, didn't the officers tell you you were a suspect at that time?

A Sure, but they didn't scare me that I was a suspect.

Q That didn't scare you?

A It most certainly did not, sir.

[479] Q I believe you told somebody on cross-examination that there was more than one of these persons that had a mustache at the time of the killing? Is that correct? Or did I misunderstand you?

A Yes, sir, that is correct.

Q Now, who besides the guy with the long knife had a mustache?

A David Gallegos.

Q Do you recall whether or not Mr. Mata had a mustache?

A No, sir, I don't recall.

Q Do you recall whether or not any of the three men that you saw attacking Mr. Arias were wearing gloves?

A Yes, sir.

Q How many of them?

A All three of them, sir.

Q What color were the gloves?

A They were black gloves.

Q As far as you know, were these state issue gloves?

A No, sir. They were street gloves, like the kind you buy out here, made out of black leather.

[496] Q Did you tell them you weren't making any positive identification and you wanted to see the person in person?

A Yes, sir.

Q You wanted to see a line up?

A Yes, sir.

Q And was anything said to you about providing a line-up to you?

[497] A Yes, sir. They were going to provide a line-up, and then something came about, and didn't ever -- it never came. I just didn't say nothing about it no more.

Q And the line-up was never offered to you after that discussion on the 19th?

A No sir. Only that it was offered to me.

[500] Q When did you see Mr. Vargas in the shower? Which one of these times?

A The last time when I identified the up to date photographs.

Q Okay. That was on the 30th of October, about eleven days after the incident?

A Yes, sir.

Q And could you tell us who was with you and how you came to see this man in the shower?

A Who was with me? Jay Allen was with me.

Q Okay, and you were being taken back into the segregation at the time?

A Yes, sir. I was being taken back to segregation.

Q And you were being taken back to the east wing where you stayed?

A Yes, sir.

[501] Q And was this shower on the west side that you saw Mr. Vargas in?

A On the west side, sir.

Q Did you have to pass by that shower to get to the east side?

A Yes, because I was brought to that side of the institution, so I had to pass right through there.

Q Okay. Let's talk a little bit about that man that you identified as Boscoe, the man you think might have been involved. Did you evertell anybody positively that that was the third man?

A Yes, sir. I told Lt. King, but I didn't give him no name.

Q Could you tell us exactly what you did tell him?

A Yes, sir. I told Lt. King, 'see, I called you here to let you know that the man that I picked, you know, was Mr. Vargas." I told them, 'the one in the place -- the one that did the killing,' I told them, 'the guy

that I picked is not that man.' I told them, 'I've seen him here in segregation and now I've seen Mr. Vargas, and when I seen him I was sure it wasn't him no more. When I seen him in person in that shower room, and that's why I called you here to let you know I did see the man the once before. I seen him in the overflow.'

And Lt. King told me, 'it's all right, just as long as you get -- when you get to court, if he's not the man, you go [502] right ahead. You tell them it's not the man.'

[582] FLORENCE JASPER ALLEN, called, shown and examined as a witness, testifies as follows:

Q Mr. Allen, directing you attention to October 19th, 1972, on that day did you have occasion to come into contact with a new inmate up there that you had known before?

A Yes.

Q Who was that inmate?

A That was Yogi.

Q Did you know what his true name was as opposed to his nickname?

A Arias. That's about it. I didn't know his real name. Just by his nickname.

[584] Q Where had you known him from before?

A I guess from my home town.

[586] Q How many people jumped?

A There was three that I could see.

Q Could you see where they were just before they jumped?

A Standing right almost in front of the door.

Q Did they jump at anybody in particular?

A Yeah. They moved on Yogi.

Q Now, when that happened, where were you in relation to Yogi? Next to him, in front of him, or behind him?

A I was standing next to him.

Q Were you doing anything besides just walking?

A I was trying to keep from being killed.

Q I mean just before these people jumped.

A I was buttoning up my coat.

Q Okay. Now, what did you do when these people first, as you say, jumped Yogi?

A Well, I started trying to help him out.

Q Well, how?

A Well, I tried, you know, to keep the guy off of him.

Q Okay. Can you describe what these people were doing?

A Well, the other two, I couldn't see that good, but the one that was in front of me, you know, he was, you know, sticking him.

Q Do you see any of the three people that were there jumping Yogi in the courtroom here today?

[587] A Well, there was two that was there, but I didn't see them stick him.

Q Okay.

A The third one --

Q Okay. At this point I'm just asking you who was there among the three that you saw that's in the courtroom today, if anybody.

A There's two there. One on each end that were standing there.

Q These two defendants over here that are on the ends of the row?

A Yeah.

MR. McGILLIVRAY: For the record, your Honor, indicating defendants Mata and Gallegos.

THE COURT: Yes.

MR. McGILLIVRAY: Q Are you saying that you didn't see either one of those two actually stabbing anybody?

A No. I didn't see them. The only one I did see was the other guy.

Q Okay.

A Cause I was standing right in front of him.

Q What did you see the other guy doing?

A Well, I seen him stick him once.

Q Did you see a knife?

A Yeah.

Q Can you describe it for us?

[588] A It's pretty long.

Q I'll show you what we have had marked as Exhibit Number 8. Can you see that?

A Mm hm.

Q Does that appear to resemble the weapon that you saw in that man's hand?

A Yeah.

Q Okay. You can't be sure this is the identical one, I assume.

A No.

MR. SIMRIN: Your Honor, I believe that might be number 9.

MR. McGILLIVRAY: My list might be wrong.

MR. McGILLIVRAY: The Clerk say seven.

MR. SIMRIN: I'm sorry. Number 7?

MR. McGILLIVRAY: So we're both wrong. Exhibit Number 7 is what I just showed the witness. Put it away.

[595] Q I'm asking you about before. Were you familiar with any of them in any way before Yogi got stabbed?

A Biggs. I was in Dorm 5 for a while.

Q You were in Dorm 5 for a while?

A Yes.

Q Which one is Biggs?

A The one in the yellow shirt.

Q Did you just see him there, or were you friends with him, or what?

A No, he lived in the dorm.

* * *

Q The first time the pictures were shown to you, were you able to identify anybody?

[596] A No, they were pretty old.

[612] Q Were there people in this aisleway between where you were walking and the doorway? Did you notice people in that area?

A I noticed people coming out and going into the TV room.

Q You didn't pay any special attention to them?

A No, I just kept going.

Q Were you looking in the direction of the exit door?

A Yeah, glancing up and buttoning my jacket as we walked off.

[614] Q Were you looking at that man with the big knife?

A Yes, I was looking at him.

Q You got a good look at that man?

A Yeah, I seen him.

Q And he pretty well occupied your attention from then on, didn't he?

A That's right.

Q And were you just looking at the knife, or did you get a good look at his face, too?

A No, I was looking at the knife.

Q And you were looking at his face?

A You know, I was just worrying about keeping from getting myself killed.

[617] Q So all you really saw of the fight was when this third man -- the man that is not here in the courtroom -- came at you with this big knife?

A Yeah.

[621] Q Can you tell us what these three people that attacked Mr. Arias were wearing?

A They had their state clothes on, you know.

Q And by "state clothes", do you mean blue denim clothes?

A Yeah, the ones they give you.

Q Did any of them have mustaches?

A Yeah.

Q Which ones had mustaches?

A All three of them did.

Q And what about hats? Were any of them wearing hats?

A Their beany caps.

Q By "beany caps", so you mean the blue knit caps?

A Yeah.

Q How many of those were wearing beany caps?

[622] A All of them, I think.

Q Did any of them have anything on their hands?

A Gloves.

Q Were the gloves state issue?

A A lot of people have them.

Q They are not issued by the state then?

A No.

Q Do you know what color these gloves were you saw on these people's hands?

A No, it was just that they had gloves on.

[623] Q Did you ever tell anybody that you saw the third man?

A No, I just, you know, kept it to myself.

Q Now, you were making identification so why did you keep it to yourself?

A I mean, what good would it do me to tell anybody?

Q Well, you identified three people as being involved, and was there some reason you kept that name to yourself?

A Well, I thought the third guy was him. He looks just like the guy except he's taller. I made a mistake.

Q He looks like who?

A The third man.

Q He looks somewhat like Mr. Vargas?

A The middle man? I that Mr. Vargas?

MR. MCGILLIVRAY: I can't hear the answers.

THE COURT: He said "middle man", "Is that Mr. Vargas?"

THE WITNESS: Yeah, well, he looks like him.

Q (By Mr. McGillivray) Except you say he is taller? Is that right?

[638] Q Did you know that Mr. Arias was going to be coming to Tehachapi?

A Yeah, I knew he was coming down.

Q You knew it ahead of time?

A Yeah, it was talk, you know.

[650] Q Now, when you were telling the correctional officers, the Sheriff's officers that you couldn't identify anybody, and they showed you pictures that you couldn't identify, and you couldn't identify anybody, were you telling the truth to them, or were you just trying to not get involved?

A Just trying to not get involved.

Q When you finally identified three people from pictures, like you told us before, were you at that time doing your honest best to identify the people who actually were involved?

A Yes, sir.

Q Did the correctional officers or the Sheriff's officers try to tell you or

attempt to tell you in any way who you should identify?

A No. They just had a bunch of pictures laid out.

Q About how many pictures would you say there were?

A About a dozen, I guess.

Q. Thank you. That's all.

[667] ALBERT MILLS, called, sworn and examined as a witness, testifies as follows:

[675] Q (By Mr. McGillivray) Would you proceed to tell us what transpired when Mr. Childress contacted you?

A He said he had been a witness to the killing in Dorm 8, and that he was fearful of his life.

Q Now, after he advised you of this, what action, if anything, did you take regarding what he did tell you?

A I took him from the sergeant's office into the lieutenant's office, and

called an officer to stay with him. I continued asking him questions concerning his fear; if he felt it was sound, and he said that he thought that probably he would not be left as a witness. He was fearful that those involved in it would also kill him.

Q Did you take any action to provide for his safety?

A Yes. It was shortly prior to the feeding of the institution. We had a count going at that time. While the inmates were off the yard, I took him through the sally port in control, and around the front of the institution to the investigation office.

Q That is the portion of the institution where inmates don't have a free run of the place, so to speak?

A Yes.

Q Once you got him there, did you make any efforts to obtain identification from him as to who had perpetrated the stabbing?

A I asked him if he could and if he would identify the people, and he said he knew some of them, but he didn't know one of those names, and he would identify them.

Q Did he indicate the names of any of them he did know?

[676] A Yes.

Q What did he indicate?

A He said he knew Mata and Gallegos, and the other one --

Q I'm sorry. I assume the other one he didn't know his name?

A He said he could identify him. He knew him on sight, and thought he live in Dorm 5 or 6.

Q What action did you take then?

A I got a Rollodex, which is a picture description of all the inmates in that particular facility, and I pulled --

Q And in what particular facility?

A The medium unit.

MR. MCGILLIVRAY: Go ahead.

THE WITNESS: I took the pictures of Gallegos and Mata out of it, and he said those were two of the people that were involved.

Q (By Mr. McGillivray) Did you do anything in attempting to get an identification of who the third person involved was?

A Yes. I sent for the dorm cards from Dorm 5, which is a record of daily activities, more or less, of the inmates in the units, but it includes a photograph of each inmate in that unit.

Q Is there an individual card for each individual inmate?

A Yes.

Q Were they brought to the office you were in?

A They were brought to the investigation office, yes.

Q Would you describe what procedure you followed with the photographs that were brought there?

[677] A They were given to Childress to look at. He picked Mata's picture from that group as one of the participants, which he had already previously done, but he said the other man was not in that group.

Q Did you take any further action then after he told you that?

A Yes. I got the dorm card from Dorm 6, and had him go through those.

Q What happened when he went through those?

A And from those he picked the picture of Vargas.

Q Now, are these dorm cards with the photos that you are referring to -- are they rotated or changed as the inmate population changes?

A Yes, they are kept current. If an inmate is transferred or moves to another unit or another institution, the card does with him.

[681] Q You said that Mr. Childress named Mr. Mata and Mr. Gallegos?

A Yes.

Q You said he didn't know the other?

A He knew him on sight.

Q And I believe you said you went and got this Rollodex of pictures?

A Yes.

Q And you pulled out the pictures of Mata and Gallegos?

A Yes.

Q And showed them to him?

A Yes.

Q And asked him if those were the two?

A Yes.

Q Mr. Mills, why didn't you show him the whole Rollodex without picking out those two first?

A It contained approximately six hundred photographs. He knew these people by name, and the other by sight.

Q That was what he had told you?

A Yes.

Q After the showing him of the roll of pictures, how many pictures did you show him next?

A Approximately seventy other photographs in Dorm 7 or Dorm 5.

Q You were showing his pictures according to dorm?

A Yes.

Q And from Dorm 5, he picked two?

A He picked Mata and said he had previously seen him.

[682] Q Did you show him any other dorm group?

A Yes. After he was unable to identify the third party from that group, I showed him the photographs from Dorm 6.

Q Did he make any identifications from that group?

A Yes.

Q Whose pictures did he pull out there?

A Vargas.

Q Did he ever pick out Gallegos's picture?

A It was placed with the group of photographs, and he picked all three of the photographs from this group.

Q When was that group showed to him?

A Immediately following the time that he picked out Vargas. Gallegos was still in the Rollodex, and I gave him that photograph.

Q How many pictures were in the group that you showed him?

A I showed him actually two groups of pictures. Dorm 5, he was able to choose but one, which was Mata. In Dorm 6, he chose Vargas. I took all those pictures from Dorm 6, inserted the photograph of Mata and Gallegos, added several others, and had him go through those.

Q This is after you had already pulled out the two pictures from the Rollodex?

A Yes.

[688] Q And then you say at that point you went and got the pictures from Dorm 5, and asked him to make an identification from Dorm 5?

A Yes.

Q Was there any reason that you did that?

A He indicated that the other participants had lived in either Dorm 5 or Dorm 6.

Q He didn't tell you that both of them lived in --that two people lived in Dorm 6?

A No.

Q He didn't have a discussion with you -- you didn't bring him a batch of pictures from Dorm 6 at first, and let him look through those, and Mr. Childress failed to make an identification from those Dorm 6 photographs?

A No, sir.

Q You didn't have any discussion with him about, after he was looking through some

pictures, what he really meant was Dorm 5 and not Dorm 6?

A No.

Q He never described what dorm he meant in terms of geography of the institution?

A No.

[693] Q Now, Mr. Childress has testified in this trial that at the time that he came in to see you, he didn't know any of these people's last names. Is that according to your recollection of what it was?

A No, sir, it isn't.

Q And it is your recollection that he also identified Mr. Mata as "Mata"?

A Yes.

Q And it is your recollection that he knew the last name at that time?

[694] A As I recall, yes.

Q Now, you testified earlier that Mr. Childress picked out several photographs from the Rolodex. Isn't it a fact that you picked

out the photographs from the Rollodex and showed them to Mr. Childress? That's what he testified to, and not your previous statement.

A Yes.

Q In other words, he didn't pick out photographs from the Rollodex?

A Correct.

[707] ROBERT E. KING, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

[711] Q Did he make any positive identification of anyone at that time?

A Yes, he made what we considered a positive identification in that he gave us a name of an inmate who had supposedly, he reported, been identified to him by other inmates.

Q What name did he give you?

A He gave us "Bogus" Pete Nunez.

[713] A I told Mr. Almengor that "Bogus" Pete Nunez could not have been involved in

the incident since we knew that he was outside the security area on a work detail at the time of the incident.

[714] THE CLERK: People's Exhibit 23 for identification.

Q (By Mr. McGillivray) After the twenty-four or twenty-five photographs that you used -- let me back up. After you used those twenty-four or twenty-five photographs that you have mentioned to us, did you retain them in your custody or turn them over to somebody?

A I turned them over to Investigator Higgins.

Q I show you Exhibit 23 for identification, which is a reproduction of twenty-four different mug shots? Is that correct?

A That is correct.

Q As best you can recall, do those appear to be the photographs you used on the 27th to show Mr. Almengor?

A Yes, they appear to be the same ones.

Q Are the three defendants in this case seated over on the other side of the courtroom portrayed in any three of these photographs?

A Yes, they are.

Q Would you take this marking pencil -- well, let's just [715] put an "X" under the photos of each of the three defendants.

(Witness indicates.)

Q Now, were these photographs that were taken within a week, say, of the time you showed that to Mr. Almengor, or were they older?

A There's no way of knowing when they were actually taken. They were standard mug shots taken when the inmate is brought to the institution. They could have been taken at various times, but they were not taken specifically or recently, to my knowledge.

Q You didn't make any special effort on that occasion to get brand new photographs of all of these inmates, did you?

A No, I did not.

Q When Mr. Almengor was shown those photographs, was there any identifying marks on the front of them he could see, such as the name of the inmate, or a date, or anything like that?

A They were marked, but we covered up the markings.

Q How did you cover them?

A Laid another photograph on top of another until the last row, and then we covered that with paper.

Q So they overlapped where any identification was?

A That's right.

Q Did Mr. Arias [sic] pick any photographs out of that as either being positively one of the assailants or possibly one of the assailants?

A He possibly identified Inmate Vargas, but it wasn't a positive identification.

Q And did he make any request concerning a better [717] opportunity to observe pictures of people?

A Yes, he said he felt the photographs we were showing him were too old; that the appearance may have changed; and he requested some later up-to-date photographs.

Q Now, did you make any efforts to obtain some later photographs?

A Yes, we did.

Q Would you describe what you did in this regard?

A The first attempt, we had a number of inmates photographed. However, they did not come out due to a mistake by our photographer.

Q Who was your photographer?

A I don't recall his name.

Q Was he a professional photographer or an inmate photographer?

A An inmate photographer.

Q And what happened after the first attempt didn't work?

A We then had the defendants photographed, and we took other photographs, and had them reproduced to the same size.

Q On October 30th, 1972, did you show those photographs -- those new ones and the other ones you have just described to us -- to Mr. Almengor?

A Yes, I did.

Q Was anybody from the Sheriff's Office present with you on that occasion?

A No, there wasn't.

Q Approximately how many photographs did you show on that occasion altogether?

[717] A I believe there were fifteen.

THE CLERK: People's Exhibit 24 for identification.

Q (By Mr. McGillivray) Again, when you finished using those fifteen photographs in your part of the investigation, did you turn those over to Investigator Higgins?

A I did.

Q Showing you Exhibit 24 for identification, which is a photographic reproduction of fifteen different mug shots, do those appear to be the photographs you used on October 30th with Mr. Almengor?

A They do.

Q The three defendants are included in this exhibit?

A Yes, they are.

Q Would you take the marking pencil again and put a "X" under the photo of each defendant?

(Witness so indicates.)

Q On this occasion, first of all, those photos as they are pictures in Exhibit 24, they have the names and dates on the bottom of them? Is that correct?

A That is correct.

Q Did you do anything to conceal that information from Mr. Almengor when you showed the photographs to him?

A Yes, I did. I used the same method I had used before -- overlapped the photographs, and covered the last row with paper.

Q The only thing that was visible to Mr. Almengor was the actual faces, themselves, in the photos?

A That is correct.

Q Did Mr. Almengor pick any of those photos out as being [718] photos of any of the assailants of Mr. Arias?

A Yes.

Q Which one did he pick out?

A He picked Gallegos, Vargas, and Mata.

Q Did he qualify his identification in any way as saying they were just possible instead of positive?

A No, he did not.

Q Did you take a statement from him when he made that identification?

A Yes, I took a taped statement.

[719] I would like now to turn to the contacts you had with J. Allen. Did you have a contact with him concerning possible identification of the assailants in this case on October 19th, the day of the killing?

A Yes, I did.

Q Do you recall approximately what time of the day or night it was that you contacted him about this case on that occasion?

A I'm not sure of the exact time. It was late in the afternoon or during the night.

Q Was Investigator Higgins from the Sheriff's Office with you on that occasion?

A Yes, he was.

Q Now, on that occasion, was Mr. Allen asked if he could make an identification of any of the assailants?

[720] Q Now, when you showed those to Mr. Allen, did he identify anyone from those pictures?

A No, he did not.

Q Can you tell us, as best you can recall, what he had to say, if anything, about identifying some of those photos?

A As I recall, he stated he couldn't identify anybody from those photographs; that they appeared to be old photographs.

Q Now, you told us that you saw and talked to both Mr. Allen and Mr. Almengor on the twenty-seventh. Did you see them both at the same time, or were these separate interviews?

A I talked to them separately, and together.

Q Okay. Was Mr. Allen present on the occasion of the twenty-seventh when Mr. Almengor tentatively or possible identified the photo of Inmate Vargas: Do you understand my question?

A On that occasion, he wasn't present.

Q I would like to direct your attention to October 30th, and ask you if you contacted Inmate Allen again on that day?

A Yes, I did.

Q Was anyone from the Sheriff's Office with you on that occasion?

A No.

Q Did you show any photographs to Mr. Allen on that day?

A Yes, I did show him some.

Q Referring you to Exhibit 24, which is a group of fifteen photographs in front of you, is that the group of photos that was showed Mr. Allen?

A Yes, it is.

[722] Q Again, did you follow the same procedure of covering up the identification on the photographs before you showed them to him.?

A That is correct.

Q You have already told us you showed those to Mr. Almengor on that day. Would you describe chronologically how you did it? Who went first? Just the procedure you followed?

MR. LANIER: Excuse me. Which day is this?

MR. MCGILLIVRAY: The 30th of October.

THE WITNESS: Yes. I had Almengor brought to my office, and had the photographs laid out on the desk with the identification covered; showed them to him, and he identified the three defendants. I then had Mr. Allen brought to my office. Almengor walked up to the table, and identified the same three defendants.

Q (By Mr. McGillivray) Was there any conversation before Mr. Allen's identification between himself and Mr. Almengor?

A No, there wasn't.

Q Did you or anyone in your presence advise Mr. Allen that Mr. Almengor had identified these three defendants?

A No, there wasn't.

Q Was the taped statement that you took from Mr. Almengor, which we have marked as "Exhibit 25", taken before Mr. Allen was brought into the room?

A Yes, it was.

Q When Mr. J. Allen identified the same three photographs, these three defendants, did you take a taped statement from him?

[723] A Yes, we did.

[733] Q Now, on October the 19th, did your report reflect that Mr. Almengor positively identified "Bogus" Pete as one of the assailants?

A Yes, it does.

Q And that he made that positive identification of "Bogus" Pete after he looked at photographs?

A It doesn't reflect that this -- he did look at the photographs. However, the identification that he made was not made

directly from looking at a photograph, no.

Q But your report indicates, does it not, that he positively identified "Bogus" Pete after looking at the photographs?

A Yes, it does.

Q And that at the same time, after looking at the photographs, he tentatively identified Mr. Vargas?

A That's true.

[734] Q After he made that identification, wasn't he advised by you or some other authority in your presence that "Bogus" Pete was out of the facility at the time of the killing?

A That's true.

Q At that point he said, "Let's look at some more pictures"? Is that right?

A True.

Q And he looked at some more pictures, and then he identified again, tentatively, Mr. Ramirez and Reymundo? Is that correct?

A That is correct.

Q Those were the only ones he picked out that day? Isn't that true? Just those four?

A Four, yes.

Q Not eight or twelve, sixteen, but just four?

A As far as I recall, he narrowed it down to four possible.

[738] "Interview of Inmate Almengor, prisoner housed at the California Correctional Institution at Tehachapi. Present during this interview is Sergeant William McCaslin, Officer Walter Lomas, and Lieutenant Robert King. This interview is being conducted in regard to the stabbing of Inmate Arias on October 19, 1971. The [739] time is 6:35 P.M. The place is the investigator's office, medium facility, California Correctional Institution.

Q (By Mr. King) Okay, Mr. Almengor. We've discussed this case on two or three

separate occasions prior to this interview? Is that correct?

A Yes, we did.

Q Okay. The first time I talked to you was on the evening of the incident, on the evening of the 19th of October?

A Yes, sir. That's correct.

Q All right. And at that time we were in the lieutenant's office in the medium facility? Is that correct?

A Yes.

Q And that's where we, uh, searched you, and checked you for bloodstains, took hair samples and other, uh -- we had some conversation at that time? Is that right?

A Yes.

Q Okay. And then a little later on that evening I, along with the Sheriff's investigators, talked to you some more? Is that right?

A Yes, uh-huh.

Q And during that conversation, we showed you a group of -- well, we showed you numerous photographs? Is that correct?

A Yes.

Q Probably a couple of hundred or better? Is that right?

A About four or five hundred different photographs.

Q All right. And when you looked at those photographs, you said you could not be absolutely sure of identifying anybody, is that correct, at that time?

[740] A Yes, uh-huh. Not the little, small photographs because they didn't look like, uh, up-to-date, you know photographs. In other words, they had haircuts, and they looked different, and they might have been at least a year or two years old -- them photographs.

Q All right. So you felt because the people you were trying to identify were not

clearly represented by those photographs? Is that right?

A Yes.

Q So you did not positively identify anybody at that time?

A No.

Q Okay. And then on October 27th, I again had occasion to discuss this case with you along with Officer Higgins of the Sheriff's Department? Is that correct?

A Yes.

Q And at that time you were shown another group of photographs? Is that correct?

A Yes, that was another, I would say about, fifteen, twenty photographs.

Q Okay. And those were the same type of photographs, is that correct, as you had been shown before?

A Yes, they were.

Q And did you tell us at that time that you could not positively identify

anybody from those photographs because you felt they didn't represent the people as they are now?

A Yes.

Q And did you say that, uh, one of those reasons was [741] because some of the people now have mustaches and long hair, and had changed in other ways, uh, and no longer looked as they did when those photographs were taken?

A Yes, that is correct.

Q All right. Now, I have just shown you a group of fifteen photographs. You have indicated that you can identify three people from this group of fifteen photographs? Is that correct?

A Yes.

Q Now, these are recent photographs that have been taken that show the people as they are currently -- with mustaches, long hair, and so on? Is that right?

A Yes.

Q All right now. As we went through these photographs, you identified three different inmates? Is that picture I'm showing you one of those that you have identified?

A Yes, it is.

Q Okay. This is Vargas, B-35042. And this photograph, is this one you identified?

A Yes, it is. That one right there, too.

Q Okay. This is R. Mata, M-a-t-a, B-23991. And here's a third photograph. Is this one you have also picked out of this group?

A Yes, that one, too.

Q This is D. Gallegos, G-a-l-l-e-g-o-s, B-39506. All right, Mr. Almengor, now, would you -- would you tell me in your own words why you picked those three people from that group of photographs, and what significance

they have in relation with [742] this investigation?

A Well, I could recognize, you know, one of them correctly, you know.

Q You mean before out of these other photographs?

A Yes.

Q Which one was that that you --

A It was Vargas.

Q You had previously recognized and identified Vargas as being one of the attackers of Arias? Is that right?

A Yes, sir.

Q Okay. Go ahead.

A And the other one, which is this one right here --

Q That's Mata?

A Mata, yes. I could recognize him also because of the reason that he was facing toward -- he was facing -- he was looking at me eye to eye, you know, at the time of the

stabbing when he backed up. We stood there several minutes, you know, seconds, I guess, you know, as you call it, looking at one another. That's why I could identify him.

Q All right. And how about the third -- third person, Gallegos?

A Gallegos (pause), Gallegos, him -- well, I identify him because, uh, more or less, uh, there's no, uh, there's no other one who looks like Gallegos there, and I'm pretty sure that he's the third person, which I didn't take a look at him very well except from his sideview and his back, and I didn't get to see correctly, you know, straight mug shot from frontwards, and plus, uh, he's, uh, he fit the other party in size [743] and everything, you know, because I've seen him, too in person.

Q So you feel certain in your own mind that Gallegos was the third person --

A Was the third person.

Q -- during the attack on Arias?

A Yes, I do.

Q All right. Now, you know that this conversation is being tape-recorded? Is that correct?

A Yes.

Q And you have indicated to me and to other officers from the Kern County Sheriff's Office that you intend to testify in court, if necessary, as to the things that you are telling us now?

A Yes, I do.

Q And that you know that you would be required to testify under oath?

A Yes, uh-huh.

Q If you are ever called to court as a witness?

A Yes, I know all this. I'm aware of all this.

Q And you are aware of the penalties if you do not tell the truth or if you

falsely identify somebody, knowingly falsely identify somebody? Is that correct?

A Yes, uh-huh.

Q Okay. Why don't we go back to the day of the attack, and just in your own words tell me what happened and what you saw that day?

A What I saw? Well, I'll start out when it actually started, you know.

[744] Q All right. Do you remember what time that was?

A It was about two o'clock.

Q In the afternoon?

A Or it could have been 1:30, you know, in the afternoon because I had already reported to work, and I report to work at 1:00, at least. I'm working grounds crews, and I had already cleaned up my area, and came home to my dorm, which was Dorm 8, and as I went in there, I stood there awhile. So I guess it would be about 1:30 when everything started moving, you know.

Q What do you mean "everything started moving"?

A You know, like, uh, you know I got to know this man, you know, that got stabbed, you know, and I went over to a friend of mine's bed, you know, because he asked me -- he called me over there, and asked me for some coffee. And there was another inmate there which wasn't in our dorm, and I got introduced to him, and then he told me that he had barely arrived, and he --

Q Who was this other inmate? Did --

A The other inmate was the inmate that got stabbed.

Q Did they tell you his name at that time?

A Yes, they toldme his name, but, you know, I more or less forgot it, you know. See, I only know -- see, they told me the name of, you know, what he's called, you know, and which was "Yogi". That's all.

Q Yogi?

A Yes, they called his name "Yogi", and, uh, I offered him the coffee, and they were talking about the streets the time when I was there, you know, about, you know, what times they had [745] each other in the streets, when they were in the streets, you know, what times they had, you know, and then I went back to my bunk, and I got my glasses, and I was going to the TV area. And at that time when I was getting my glasses, they called "All new arrivals", you know, "report to the laundry and pick up your issue" -- the laundry issue because that night, the night before that, I mean, you know, when that bus drove up, it drove up at night time.

Q That night before the incident? Is that correct?

A Yes, and that night it was raining, and they didn't issue out, you know, them all their laundry issue. So the next day, that's

why they called laundry issued about 2:00, you could say about 1:45, somewhere around there. So then they get up, and at that time I'm already there over to their bed because they slept much closer to the office than I did. And so I catched them up, not quite all the way up to where they're at, you know. They are already by the water faucet, and I'm catching them up already, and they turn around, and they tell me, "Do you want to go to the laundry room with us?" And I look at them, and I tell them, "Well, I guess it's all right, you know. I was just going to look at TV". So I tag along with them right there, and as we started to step out, there is three, you know, three, uh, three persons -- three other inmates that don't belong in the dorm standing there at the bulletin board looking at the roster sheet and the movement sheet, and all that, pretending like they're looking at it. Two of them are pretending

like they are reading it, and the other of them gots hs arm on top of the little wall that comes right there to separate them from the little aisle [746] they were by.

Q Would that be by Bed No. 1? The little wall by Bed No. 1?

A Yes, sir. And he has one hand, which is his left hand, on the wall, and one hand he's got in his coat. And I noticed that all of them were wearing black gloves, you know, and they start turning around fast, as soon as we, you know, get up real close to them. I'm still, you know, like, say, about two steps behind, you know, these other guys, because I'm, you know, going to catch them up and going to walk right beside them. They turn around, and they just go directly at one of the -- at that other guy that was walking there that didn't belong in our dorm, which was the one that got stabbed by the name of "Yogi". They just attacked him -- two of

them. The other ones go to attack him, too, but when he sees that I, you know, am catching up, and that I continue walking, so he attempts to me, you know, and at this time I'm looking at all this, and they're already stabbing him -- the one by the wall was stabbing him in the back, you know.

Q All right, now. Who was doing -- who was next to the wall that you referred to as doing the stabbing?

A The one next to the was was Vargas.

Q Vargas.

A Yes. And the one that was in front of him, stabbing him from the front -- Vargas was stabbing him from the back and the side of the neck, which I got to see, and I seen this other one, which is this one --

Q Gallegos?

A Yes, which I didn't see his face, you know, in a direct, [747] you know, look forward because he was facing them and, like,

with his head down, you know, and he was like sticking him in the stomach, you know, with a smaller knife, which I did get to see when he drew it back, and then later on, you know, I turned back to this other guy, you know.

Q Which other guy are you talking about? Mata?

A Yeah, which is Mata, and Mata's standing right in front of me. And Mata looked at me, and I continued walking, you know, coming more nearer to the thing that's taking place -- the stabbing. So he attacks me, you know, thinking that, you know, I'm going to help out there, you know.

Q Now, does he attack you with a weapon or with his hands, or what?

A No, with the weapon. He had a knife in his hand, and he had it in his right hand, and he comes forward towards me, like throwing two swings, you know, and so I see him, and right away, you, I -- my reflexes

just, you know, move me towards him, you know, and I just get into a fight with him right there, you know, and I throw a kick at him, and I exchange about three or four, you know, different swings with him, and he backs off, you know, because I guess he sees that he's not going to, you know, get to me. So he backs off, and he stays looking at me, and I stay looking at him, and I turned back and looked at the stabbing, which while me and him were, you know, fighting, I heard a jingling noice like a drop, you know, like, you know, some money, you know, noise, or something like an aluminum object, or something. And when I turned around to see, you know, the stabbing, I seen a knife on the floor, and I seen J. Allen, which [748] was the other inmate that was beside him, beside Yogi, you know, helping him down towards the floor, and the stabbing was already, like, you know --

Q He was helping Yogi towards the floor, you mean?

A Yes, uh-huh, because Yogi was falling. So he attended to him, and put him down on the floor, you know, laid him down, you know, and when he laid him down, Mata, right there, you know, he wasn't doing nothing no more. He was just looking at me making sure that I wasn't, you know, attacking him, you know. Now, all he was doing was, like, uh, keeping me out of it, you know. and I just looked at him, and I see -- and I see one of the knives on the floor, which was the knife that this one --

Q Gallegos?

A Gallegos, yes, had broke, because as, you know, as soon as the noise fell on the floor, I turned around and Gallegos, you know, no longer had a knife in his hand, and he's the only one that could have had that knife that broke off, you know, or fell out of his hand.

Q Uh-huh.

A And that's how it happened, and they they just turned around, which is this one, Mata -- he turned around, and he went outside, and the others, you know, turned around, and they followed right behind, but I saw this one right here --

Q Vargas?

A Vargas was the last to leave, you know, to go ouside the door. And that was the last I seen of them.

Q Now, as far as what you saw there that day, then Mata was completely occupied with you?

[749] A Yes.

Q Did you see him actually stabbing the victim at all?

A No, sir. I didn't see Mata stab the -- I seen Mata. He was going to attempt to it, but when he seen me coming, you know, he backed off, and he came at me instead.

Q And then he was involved with sparring with you? Is that correct?

A Yes, uh-huh.

Q But now, did you see any of the other two actually stab Arias? Did you actually see them stabbing with the weapon?

A Yes, which is Vargas and the other man right here, Gallegos.

Q Did you see the weapons in their hands?

A Yes, I seen the weapons in their hands.

Q Did you get a good enough look at them to tell what they looked like? Were they both the same, or were they differentz?

A No, they were different, you know. The one, Vargas, was long, you know, and bigger, like, you know, more or less a big pointed object, you know, filed down, like a long knife. Thin, you know, and long. And this one right here -- Gallegos -- he had a

small one. I'd say about five inches long, only it wasn't that pointed or sharp.

Q Now, did you say that Gallegos was behind -- was in front of the victim?

A Yes.

Q Stabbing towards the midsection -- stomach area?

A Yes, uh-huh.

[750] Q And that Vargas was behind the victim, stabbing into the back area?

A Not exactly all the way behind him directly, you know, like in the side of him, like in the side of his left hand, you know, right next to him, like facing him in the side, you know, and from there, you know, he just had his hand to his side, and he was stabbing. He stabbed him in the back, and he stabbed him in the front, you know, which was in the neck, you know, and that's all I got to see where he stabbed him thre two times right there with the long knife.

Q Did you know any of these three prior to that incident? Did you -- were you friends with them, or did you know them personally prior to that date?

A I never talked to none of these inmates, and I never knew them as long as I been on this side of the institution.

[751] Q All right, now. Has anybody promised you anything since you've been in segregation?

A No, sir, I'm doing all this volunteerly.

Q All right. Has anybody threatened you?

A No, sir.

[752] LIEUTENANT KING: All right. This interview is terminated at 7:05 P.M., October 30, 1972."

[793] "This is Lieutenant King at the California Correctional Institution at Tehachapi. I'm tape recording an interview

with Jay Allen, N-35235. Mr. Allen is an inmate housed at the California Correctional Institution at Tehachapi. The date is October 30, 1971. The time is 7:30 P.M. Present during this interview is Sergeant William McCaslin, Officer Robert Lomas, Inmate Almengor, Inmate Jay Allen, and myself, Lieutenant King. The place is the investogator's office, medium unit, C.C.I.

This interview is in regards to the fatal stabbing of Inmate Arias, A-r-i-a-s, on October 19, 1972, in the Medium Facility, C.C.I, Tehachapi.

Q. BY LIEUTENANT KING: Okay, Jay, I've shown you a group of fifteen photographs, mug shots, taken at the institution here [794] at Tehachapi. Now, you have chose three of these photographs, and have stated to me the three people you have chosen were the people who attacked Inmate Arias on October 19? Is that correct?

A Yes.

Q All right. I'm showing you one photograph now. Is this one of the three that you identified?

A Yes.

Q This is Gallegos, G-a-l-l-e-g-o-s, No. B-39506. All right. Here is another photograph. Is this one of the three you have chosen?

A Yes.

Q This is Vargas. V-a-r-g-a-s, B-No. 35402. Here is a third photograph. Is that the one you have identified?

A Yes.

Q This is R. Mata, B-No. 23991.

Now, Jay, on October the 27th, you were interviewed by myself and Investigator Jim Higgins of the Kern County Sheriff's Department, and at that time they showed you a group of photographs, and you stated at that time you could not be sure of the

identification; you stated at that time that the photographs were old and some of the people had changed and no longer looked the same due to mustaches, long hair, and so on? Is that correct?

A Yes.

Q Now, the photographs that you see before you are photographs of inmates as they appear now. These are recently taken photographs, and you now state that you can identify these three persons as being the ones that attacked Inmate Arias on the 19th of October? Is that correct?

[795] A That's right.

Q All right. Why don't you tell me in your own words what happened and what you saw and heard that day -- the day of the incident, October the 19th; where you were at, and what you saw?

A We were in my bunk area, drinking coffee, and --

Q Where is your bunk area? Where are you housed?

A Dorm 8.

Q What is your bed number?

A Bed 78.

Q Bed 78 in Dorm? All right. Go ahead.

A We were talking, and we hear an announcement over the speaker, you know, to go down and get his property. So we got up and started to go with him -- me and --

Q You say "with him"? Who are you referring to as "him"?

A Yogi.

Q Yogi? That would be Arias?

A Arias.

Q All right.

A And Rigo was with us, and we started walking out, and there was three guys standing by the doorway, and we walked up to them, and that's when they stabbed him.

Q Okay. Now, did you see three of these people that you have identified actually stab Yogi, or what did you actually see?

A Well, the guy who was standing where I was standing at, that would be on the left-hand side of Yogi -- well, I seen him grab him --

[796] Q Which on would that be?

A This one.

Q Vargas? You saw Vargas grab Arias?

A Yeah.

Q And Vargas was on which side?

A They all grabbed him at the same time.

Q All three of them?

A You know, this guy here had his arm, you know, on -- like, see, he was standing with his face toward us, and, like, he grabbed him with his left hand, pulled his shoulder down, and swinged at him the knife.

Q And did you see the knife?

A I didn't see it until it came out.

Q But you saw him swing at Arias?

A Yes, I seen him swing.

Q And then you saw the knife as he withdrew his hand?

A Yeah, when the knife came out, that's when I knew what was going on, and that's when I went in at him, and he let loose of him, and that's when he came at me, you know.

Q And he struck at you with the knife?

A Yeah.

Q Vargas did?

A Ans so I kept backing up, and making as much noise as possible to get people to come up there, you know. I knew if I could draw enough attention, you know, I knew that this would scare him off, you know. I turned and seen Rigo. He was fighting with one.

Q Which one did you see Rigo fighting with? Do you know? [797] Could you recognize him, or just --

A I don't know. I think maybe it was this guy right here because it was this guy who was standing in the middle. No.

Q You couldn't be sure then who was fighting with Rigo? Is that right?

A I don't know.

Q Just one of the three?

A You know, it was one of these two. I don't know which one it was.

Q All right.

A So I just kept backing up, and this guy came at me.

Q And you saw -- you said they all three grabbed him, grabbed Arias initially?

A They all struck him.

Q And they all struck him? Did you see weapons in the hands of the other two?

A Yeah, they had knives.

Q What did you see? Did you see -- Could you identify the weapons, or were they just flashes, or what? What were they?

A Yeah, they were just, you know, quick flashes, and I just (slap) (slap), you know.

Q You indicate that you could hear a slapping noise or a hitting sound?

A Yes, they were sticking him.

Q All right. And then after Vargas swung at you with the knife and you backed up, then what happened?

A Well, I turned around and hollered for the officer. He was down in the dorm someplace. And then I turned back around [798] and went at him again. That's when I grabbed Yogi and pulled him back, and that's when I held him, and that's when they headed through the door.

Q You pulled Yogi back and laid him down?

A Yeah, and then I went back to the door, because, you know, like I figured the guy wasn't green, you know. I mean, and all I could do was help back his play. The other guys had blades and shit! And so I went back to the door, and I couldn't see nobody there, and just seen a knife laying on the -- down below on the stairs, and I turned back around and I started helping him, and that's when everybody came and said for us to get back to our bunk areas.

[800] Q All right. Have we promised you anything or threatened you since you have been locked up?

A No, not I know of anyways.

Q All right. Now, the three people that you've identified here from these photographs, did you know them prior to this incident?

A Well, I had seen them before, but I didn't know them personally.

Q You weren't acquainted with them?

A No.

Q Did you know them by name?

A No.

Q Is tonight when I read those names off to you, is that the first time that you knew their names?

[801] A Yes.

Q And so then you have identified them strictly by sight from your encounter with them on the 19th and also from prior encounters in the yard? Seeing them on the yard and in the general population, you recognize them? Is that correct?

A Yes.

* * *

Q Okay. Now, the day of the incident, the day that Arias was stabbed, what was the visibility like? Could you see everything clearly? Was there plenty of light?

A It was daytime, a little after breakfast.

Q There was plenty of light in the dormitory so that you [802] could see who was there?

A Yeah, it -- there was no problem about seeing.

[805] CARLOS ORTEGA, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

[812] Q While you were at Tehachapi, did you have any part or play any part in getting any of these defendants into the Mexican Mafia?

A Yes, I did.

Q Which ones, and what did you do?

A I put in Robert Mata and David Gallegos.

Q What was your position in the Mafia group at Tehachapi?

A Chief.

Q Was that because you were the one who had been in longest up there?

A The longest, and I was there at first.

[823] A He [Mata] said Gus has told him that Yogi Bear was coming, and that he had stabbed Louie Valenzuela at San Quentin and thaty they wanted both of them to hit him, and I said no, that there was nothing going to come down unless I said so.

[828] Q Did you have any conversation with either one of either Mr. Mata or Mr. Gallegos at that time about Yogi?

A Yes. They were saying, 'Well, let's get down', you know, 'Let's get him', you know.

Q What does the term "get down" mean in prison language?

A Put and knife in your hand and do your thing.

Q And what did you reply, if anything?

A I told them, 'Hold your horses'.

Q All right. Did either one of them leave you position at that time?

A They -- Robert Mata gave like a funny look to David Gallegos, and he left.

Q In which direction did he head?

A To Dorm 5 and 6.

Q Did you see him go actually to the dorm or just go in that direction?

A Go in that direction.

Q Okay. Did you have any conversation with Mr. Gallegos after Mr. Mata left?

A We were talking, and he was talking about that he wanted to get down, you know, been waiting long enough.

Q Did you contine to try to --

A I told him to hold it down, you know. I told him to cool it, you know.

Q At any time when you were standing there, did Mr. Tiny Vargas come on the scene?

[829] A Yes. He came up.

Q Did he get there before or after Mr. Mata left?

A After.

Q All right.

A As he got here, he also stated, you know, 'Yeah, we've waited long enough', you know, and then David Gallegos left.

Q Which direction did he head?

A The same way that Robert Mata left.

Q Approximately how long were Mr. Mata and Mr. Gallegos gone?

A Approximately?

Q If you can make and educated guess or a rough estimate.

A Well, about ten minutes I would say.

Q Did Mr. Vargas stay with you during that time?

A Yes.

Q All right. Did Mr. Mata and Mr. Gallegos return together?

A Yes.

Q Okay. Did you have any conversation with Mr. Mata at that time?

A Yes. He had a knife under his -- right here, you know, under his --

Q Sleeve?

A Under his sleeve, and he had some gloves on.

[830] Q What color were the gloves?

A Black.

Q Did he actually show you the knife?

A Yeah. He went like that. He wanted to give it to me.

Q You are indicating that arm extended. Down into the palm?

A Yes.

Q Did he say he wanted to give it to you, or what?

A Yes.

Q Can you describe the knife for us?

A Well, I didn't get to see, you know, just the front where it looked kind of --

Q You're making up and down motions with your fingers. Sort of jagged?

A Yeah. There you go, yeah.

Q Let me -- I think it's Exhibit 7. Did the portion of it that you saw,

Mr. Ortega, look anything like any portion of that knife I'm holding in front of you, Exhibit 7?

A That's the same thing, the same one.

Q What part of it did you see?

A The front part.

Q The part I'm holding on to?

A No.

Q The pointed part?

A Yes, sir.

Q About how much of it did you see?

[831] A About that much.

Q Indicating four inches, five inches?

A Around there, yes.

Q Okay. Did you take the knife from him?

A No. I got scared. It told him I didn't want it.

Q Did Mr. Mata say anything to you about having any other weapons besides the one we just showed you?

A He said he had one right here inside his belt -- inside of his pants here.

Q You are indicating right below the chest area?

A Yes.

[941] "MR. HIGGINS: This is the tape recorded statement of Paul Childress, No. B-38822, inmate at the Department of Corrections in Tehachapi, in the Medium Security. This recording is regarding the death of Leonard Arias, A-r-i-a-s, that occurred on 10-19-72, in Dorm 8, Medium Security, at the prison in Tehachapi. This recording is being made at 16:38 hours, 10-27-72.

[947] Q Now, you knew the people you've just identified? You knew them by sight?

A Yeah, I knew tham all.

Q BY MR. HIGGINS: You knew all three of them by sight?

A By sight, yeah, uh-huh.

Q And I think on two, you told us earlier that you knew them by nicknames?

A Right.

Q This Mata, and you stated that he was nicknamed [948] "Biggs"?

A "Biggs", right.

Q And you knew this one by --

A By his first name.

Q David?

A David.

Q How were the lighting conditions?

A Lighting? -- it was about 1:30, quarter to two in the afternoon, excellent lighting.

Q It was a clear day?

A Yes, it was a clear day. It wasn't dark or nothing in the corner where all this happened.

[953] "MR. HIGGINS: This is the tape recorded statement of Rigoberto Almengor. This statement is being taken in the Investigation Room, Medium Security, at the Department of Corrections at Tehachapi. This

interview is regarding the deal the Leonard Arias, inmate, that occurred 10-19-72.

[957] A And so I went over there and offered him the coffee. And as I sat down, I got introduced to this other inmate that was supposed to get killed. And I went back to my bed after we exchanged a few words -- who he was, and what he was doing in Tehachapi. I went back to my bed, and got my glasses, and I was then going in the direction of the T.V. area, which he had already stood up. And I walked a few steps away from Allen's bed, and then while I was going to turn into the T.V. area, Allen turned around and invited me to go with them to the laundry because they said through the speakers that all new arrivals report to the laundry for their laundry issue.

And when they said this -- he was a new arrival -- so this is the reason they were going to the laundry. So I told them,

"yeah, I'll go with you guys". And I was on the right-hand side of the inmate that got killed. Well, as we were walking out the door, and I had about three more steps I take, and these guys made a fast movement turning around.

Q What guys? Explain where they were at.

A They were right by the door in a corner of the wall where the bulletin board is.

Q That would be just as you go out the door?

A Yes.

Q Is that correct? Did you know any of these prisoners?

A No, I didn't know them. At the time they were facing the bulletin board and the dorm.

Q BY MR. KING: How many people were you talking about that were there?

A I'm talking about three people. Two of them were [958] looking at the bulletin board, pretending like they were reading the papers in it, and one of them was looking towards the dorm, leaning up against the wall, with his chest, you know, toward -- with his arms up on top of the wall.

Q BY MR. HIGGINS: Did these people live in Dorm 8 -- the three that you saw there?

A No, sir. None of them lived in Dorm 8.

Q As you approached, explain to us where the victim, youself, and Allen -- how you were? What position you were in?

A All right. As he invites me, I move closer to the man that got killed, which I am on the right-hand side of him, on the side where the T.V. is at, T.V. door is at, against the office. And Allen's on the left-hand side of him, and the guy that got killed

was in the middle of us. And then we start walking out the door to go outside. The guy that got killed, he put his head down like he knows who these guys are. And as soon as we get up close to them, to the door, they turn around, and they pull their hands out of their coats, and they all have knives.

And they come directly at the guy that's in the middle. And one of the guys, you know, sidesteps -- this guy in the middle -- and grabs him, and stabs him in the back, which Allen at the time which was beside him, he took at least two steps back when he seen these guys turn around and seen the knives in their hands. The reason the guy in the middle didn't do this is because he was looking down at the floor going out.

Then, at that time, I turn around. I took about two steps back and as soon as I seen these guys turn around real fast with [959] these shiny objects in their hands, and

I looked directly at the guy that's stabbing him.

Q Let me stop you right there, Rigo. Now you say that you looked directly at the one who had the long knife and stabbed him? You told us this earlier. You were shown 22 photographs, and you selected this one here?

A That one.

Q As the one that is actually the long shank and stabbed him in the back, was in the center?

A Yes.

Q This is S. Vargas, B-35042? Okay. Have you been shown any photos prior to today?

A Yes, I've been shown quite a few.

Q Would you say possibly 150 to 200?

A Right now I've been shown at least about 25 photographs, but I have been shown about 200 photographs before.

Q When I talked to you on 10-19-72, the day it happened, I showed you several

photographs. Lieutentant King, I believe, was present when this happened. Is that true? And at that time, you did think that you had identified one person as being there, and the person you identified today you pull as a possible? Is that correct?

A Yes.

Q And your feelings are this is the person; however, you would like to view these persons in lineups?

A Yes.

Q To be positive? Is that right? Did I word that right, Lieutenant King?

[960] LIEUTENANT KING: Yes. I believe he indicated he could be more sure of his identification with more recent photographs. Is that what you told us?

A In other words, with recent photographs that, you know, are up to date, you know, because the appearance of these guys, you know, are not the same, you know, and

these photographs that you are showing to me now.

Q BY MR. HIGGINS: All right, continue. I stopped you where the one in the middle was stabbing and you looked at him?

A I looked at him, and he continued stabbing and right away I turned. I turned, like, a little, a little bit more to the front of the dorm again, and I seen the guy in the middle -- one of the guys that was at the bulletin board, he also attacked the inmate in the front, but he -- I couldn't see him because, you know, their backs were against me. You know, the guy that was getting stabbed, his back was covering my view.

I didn't continue looking no more. I looked in front of me to see what was happening, and the third guy was there coming at me with a knife, which at the time, you know, the only thing I could think of was to defend

myself. And I exchanged about three different swings with him, and I threw a kick at him, and he backed off, seeing that he wasn't going to get to me.

So and then we both stood right there in the dorm, looking directly at each other, and he seen that the job was finished. So he turned around and ran out the door, and then the other two guys just ran right in back of him, too.

Q I mentioned the long knife before. In our conversation earlier, you stated that you had observed knives. What did [961] you mean?"

A I saw two small ones, like, about as long as a hoe shovel, not very pointed, sort of round, and a big one, which I didn't get to see too well. But the two small ones, you know, one of them was in front of me, and the other one was in front of the inmate that got killed. And the other long knife,

the one that was being held by the taller person --

Q By "the taller", you are referring to this fellow in the picture?

A Yes, to --

Q Vargas, B-35042?

A To the taller person. He was holding the big knife, which I didn't get to see too much of the big knife, but I knew that's he's the one that had the main knife, you know, and that was doing all the killing.

Q Did you see any knife other than in the hands of anybody?

A No, I just saw them two small ones and the big one.

Q Of these three you saw, did you see them anywhere except in the hands of the three?

[962] A No, just I saw them in the hands of the three, and after everything was over, one fell to the floor, you know, -- one of the small ones fell to the floor.

Q It did? You saw one of them on the floor?

A Yes, sir. After all the stabbing was done, which I heard some, you know, sounds like jingling noise on the floor, you know, and after they all ran out, I turned around and I see one on the floor fall, you know, which made me want, you know, to grab it, but only ran away. I thought it would be best, you know, for me not to even touch it at all. And nobody touched it, you know.

Q What did you do then?

A What did I do then? Well, I, like, moved around back and forth, and I looked at -- I looked at the inmate, you know, that was laying on the floor. I seen Allen, you know. I seen he was going to fall down, you know. I seen Allen grab hold of him and lay him down, you know, and then I was jus standing there. And Allen was running back and forth, hollering that, you know, to get a doctor, because a man had been stabbed, you know.

And then I stooped down, you know, to see because I didn't think that, you know, that he was that badly hurt, you know, and then I touched the inmate in the back, to more or less see how badly hurt he was. And I seen that he was seriously hurt. I seen a hole in his neck and a slice in his back, and that's all.

And then I just stood up, and got away from him because everybody said to just clear away, you know, to move away from the area. So we moved away from that area, and at that time I [963] got kind of sort of panicked when I went back to my bed area. So the first thing I though, you know, to get out of this mess was to unstrip and take all the clothes off that had blood on me. My pants had blood on them, on the foot, and my shoes. At this time I was wearing nothing but state clothes. And I take my pants off and my shoes, and I put my shoes under my bed, and

my pant, I throw them down the aisle. And I dress, you know, completely different, you know, except my shirt. My shirt -- I'm still wearing the same shirt.

All right. From there, you know, they throw a shake down, and they still don't find out that I'm the other party that was there, you know. They took in Allen because he stood there. And I didn't, you know, -- moved away right away because I didn't want to have no part in this.

And then they finally found out and connected me to the pants, by finding, you know, a stain of blood when they took a skin shafe on the door of every inmate in it. They found a stain of blood on my arm, and they connected the pants they found in the aisle, and they knew that I was the other party from that dorm that was near him, nearest to him. And so this is how they -- how I'm here right now.

Q The shoes seized, and the trousers and the shirt seized later, were yours? Is that correct?

A Yes.

[965] Q All right. Now, when you were picked up on that day, the day of the incident, the 19th -- when you were searched, you said you were give a skin shafe. You are referring to an unclothed body search? Right? Were all your clothes taken off?

A Yes, uh-huh.

Q You were searched, and that was when the blood stain was found?

A Yes, sir.

Q And you volunteered the information at that time that that was your clothing that was picked up?

A No, sir. I was tooken -- I was tooken to your office, I believe, and there -- how do you call it? -- is where I told them that everything they found, you know,

connected to me, you know -- I didn't want to say nothing at the time in the dorm because there were too many, you know, people there, you know, and I didn't want to, you know, like, burden myself, throw myself a jacket there.

[966] Q BY MR. HIGGINS: And that was the first time you were questioned regarding this at all?

A Yes. He asked -- he asked if you wanted to talk to me -- which you were there at the time, too, and I told you, yes. I'll be glad to co-operate in any way you like me to and in a manner tell you anything you like to know, and you took me over to the board-room, and that's where we talked.

MR. HIGGINS: That's correct.

Q BY LIEUTENANT KING: And the board-room you referred to, that's the Adult Authority Hearing Room?

A Yes, sir.

Q Yes, that's a quiet room. And you didn't know any of these people that you saw on the day of the incident -- the people that you talked about being in the dorm? You didn't know them personally?

A I didn't know them personally at all, sir. How do you call it? I had seen the one -- one of them going towards the door several times there to a -- to make dealings of narcotics in there, you know, in the dorm with other inmates.

Q BY MR. HIGGINS: Have you recognized a picture of this person?

A Yes.

Q And who would that be?

A Who whould that be? Well, I don't know his name, but he more or less would be the tall guy that was doing the stabbing.

Q And is this the photograph --

A Yes, sir.

Q -- of the person there?

A Yes.

MR. HIGGINS: And again, this is Vargas, B-35402.

* * *

Q Now, after I talked to you and the Sheriff's deputies talked to you on the same day, the same afternoon of the incident, and we talked to you in the boardroom, you looked through some pictures, you were placed in segregation? Is that correct?

A Yes.

[968] Q What's your status now as far as your expected parole or release from prison?

A Well, I was going -- you know, in the way me and the counselor at the dorm, you know, had it, that we had discussed before, you know, this incident happened, that he was going to write my stuff up this week, this same week that we are talking on right now, maybe this Monday. And I was supposed to at least make the last Board in November or the

first Board in December, and I would be released.

[969] Q Okay. Now, you say that the counselor was going to write your stuff up. That's the paper work and the recommendations to the Narcotic Evaluation Board?

A Yes.

Q Recommending your release?

A Yes, sir.

Q That's what you are referring to about writing your stuff up?

A Yes, sir.

Q And you are saying before this incident that you had high hopes of being released in the near future?

A Yes.

Q BY MR. HIGGINS: One other question, Rigo. We have discussed this before. How were these persons dressed?

A They had jackets. They had beanie caps on.

Q Now, by jackets, was that state issued?

A State issued jackets. They were dressed out fully in state clothes, with black gloves, because that day it was sort of cold, and they all had black gloves.

Q They all three had black gloves?

A Yes, sir.

Q And beanies? Is that the Navy knit cap?

LIEUTENANT KING: It's like a Navy watch cap, a knitted full cap?

A Yes, uh-huh, blue-type.

LIEUTENANT KING: Referred to as watch caps.

Q BY MR. HIGGINS: Watch cap. Right? Did any of them have mustaches?

[970] A Yes.

Q Describe the best you can.

A Well, the one in front of me had a small mustache, more or less like mine, you know, pretty small.

Q BY LIEUTENANT KING: Like the mustache you are wearing now?

A Yes, uh-huh. It was thin, you know, and the one that was doing the stabbing, he had a thicker mustache, and he had sort of longer hair like coming up to his neck collar and twisting up, and he also was dark complected, and the other one that was standing in front of me was dark complected, too. The guy that was doing the stabbing -- he had sort of like -- he had a, like, he looked like an Indian, more or less, like an Indian dude.

Q Rigo, you say all three were wearing gloves?

A Yes. Well, all three, when they were at the bulletin board pointing at the papers, they all had gloves.

Q Now, how did you describe those gloves?

A Black gloves.

Q Black gloves?

A Yes.

Q Do you have any impression of what kind of material they might have been made of?

A Yes. Well, uh, I have a pair like that, the kind they have.

Q Were they cloth?

A No, they were like leather, like the kind they have, you know, that are made of black leather with, you know, felt [971] inside.

Q Some kind of a padding or fur inside it?

A Yes, sir, inside. Them kind of gloves -- street gloves.

Q Now, the states does not issue that type of glove?

A No, the state does not issue that type of glove.

Q And that would be personal property?

A Yes, sir.

Q Those have to be purchased from some outside source?

A Yes.

[1091] GARY CHARLES DARKE, Called as a witness for the defense, having been first duly sworn, took the stand and testified as follows:

[1093] A I was playing cards with Childress.

Q Do you recall if there was anyone else in the area?

A Yeah, there was a lot of people around the area. It's a dorm.

Q How long had you been playing cards with Paul Scott Childress?

A About twenty minutes, half an hour.

Q Do you recall Mr. Childress sleeping just prior to the time you were playing cards?

A No. I don't recall that he was sleeping. I just know he was playing cards.

Q And do you recall Officer Loomis coming up and waking him up at the time?

A No.

Q Did you ever leave the dorm during the morning hours?

A I don't know. More likely, I probably did.

Q Did you eat lunch that day?

A No.

Q And Mr. Darke, are you in the prison system at the present time?

A I'm on parole.

Q You are on parole at this time?

A Yes.

Q When you were there, sitting and playing cards with Mr. Childress, was there something that called your attention to the fact that something unusual was happening in the dorm? How did you know something was happeining in the dorm?

A I only heard of it when people

started running from [1094] the back of the dorm.

Q Could you tell us where those people came from that were running?

A From -- it's just like they started moving from the back of the dorm, and started coming up toward the front door, like you are coming on both sides.

Q Did you hear any scuffling or any noises along those lines?

A There was noises like -- but I couldn't flash on what it was. You know, there was noises all the time.

Q Do you recall what you did when people started running up?

A Yeah, I got up.

Q Did you move away from your bunk area?

A Yeah, I went up towards the head.

Q By the "head", you mean the toilet area?

A Yes, I got about as far as that little wall. That little wall wasn't there. They put that up since that incident.

Q Which wall are you referring to? The wall that runs down the center?

A No, the little wall -- it was there, but it was a lot higher. They come and knocked them all down.

Q Was there a wall there on October 19th?

A Yeah.

Q And was it changed later on?

A Yeah.

Q What changes were made?

A It was taken down two or three levels all along the [1095] block.

Q On October 19th, was this little wall the same height as the center wall, or was it a different height?

A The same height.

Q Can you tell us approximately how high that wall is?

A It's a little higher than I am sitting down, sitting straight. It's maybe about four or four and a half feet, maybe five.

Q When you are sitting on your bunk, can you see over that wall?

A I can see over it, but I can't see over the floor. I can see the other wall -- a little bit of the floor.

Q If you were sitting on your bunk area, could you see this area right here (indicating)? Could you see people in that area?

A No.

Q Were you sitting or standing, playing cards with Mr. Childress?

A Sitting.

Q And do you recall what Mr. Childress did when people started running up along the dorm ?

A He got up right after I did. We kind of walked up together.

Q Did he stand up before you or after you?

A After I did.

Q How long after you did he stand up?

A Like it was just a fraction of a second.

[1113] JAMES LEON FAULKNER, Called as a witness on behalf of the defense, having been first duly sworn, took the stand and testified as follows:

Q Now, did you conduct an interview with an inmate by the name of Jay Allen with regard to the killing of Mr. Arias?

A Yes, this was Florence Jasper Allen.

Q Can you tell us when that was?

A November 22, 1972.

Q Where was it?

A C.C.I at Tehachapi.

Q In the course of that interview, did Mr. Allen give you any description of how the attackers were dressed?

A Yes, he did.

Q And what did he say?

A He said they were wearing stocking caps, state issue at Tehachapi. They were pulled down over their ears, and they were wearing what he referred to as Levi issue coats, which were Levi jackets.

Q Did he indicate to you whether any of the attackers had mustaches?

[1118] A Yes, he did.

Q And how many of them did he indicate?

A He said one did.

Q Did he indicate to you whether or not all three attackers were Chicano?

A He stated they were Chicanos.

Q All of them?

A Yes. What he told me is they were Chicanos. I then said, "Could they have been Caucasian?" And he said, "They could have been. I'm not sure."

Q Did he indicate to you what he had been looking at during the course of this episode?

A Yes, a knife.

Q Did he indicate to you how long this entire episode took?

A Within a few seconds.

Q Did he indicate to you whether or not he had gotten a good enough look at any of the assailants to identify them?

A He stated that at that time, that from the time the indicent occurred until the time I interviewed him, that he had never gotten a look; he had never been able to observe any of the assailants to the extent where he could identify them.

Q Did he indicate to you why he had made an identification at the preliminary hearing?

A He indicated to me why he had informed the authorities that -- well, the

preliminary hearing hadn't taken place at that time.

Q Did he indicate to you why he hadn't made any specific [1119] identification?

A Yes, he did.

Q What did he say? What was the reason for that?

A There were a number of reasons.

Q Will you give them to us, please?

A Yes, the first reason was that at the time these defendants were taken out to photographed, they were the only ones taken out of segregation to be photographed. And apparently, there was some recent photographs taken. So he assumed that since they were the only ones in segregation that were on the chart, the photographic chart he was shown at a later time -- that they must be the ones that did it.

The second reason he gave was that he felt there was pressure from the Department

of Corrections, and when I say "pressure", what I mean there is that he was coming up to be paroled.

MR. MCGILLIVRAY: I will object. If I understand correctly, Mr. Faulkner is saying what Mr. Faulkner means.

THE COURT: Yes, I will sustain the objection and strike your impression.

Q BY MR. SIMRIN: Did Mr. Allen indicate to you what he meant by that?

A Yes, Mr. Allen indicated he was an "N" number, which means that he is there for narcotics and that he was due to be released, and that if he didn't co-operate with the people from the Department of Corrections, that he wouldn't be released at his date that he was due.

Q During the course of you interview with Mr. Allen, [1120] did the subject of lie detectors come up?

A Yes, it did.

Q Would you tell us in what regard that came up?

MR. MCGILLIVRAY: Your Honor, I will object without an offer of proof.

MR. SIMRIN: I will be glad to make one.

THE COURT: I don't see the materiality. I think you had better make an offer of proof if you intend to go through with it.

MR. SIMRIN: May we approach the bench, your Honor?

THE COURT: Yes.

(Off-the-record discussion between Court and Counsel.)

Q BY MR. SIMRIN: Mr. Faulkner, who mentioned the lie detector?

A Mr. Allen.

Q What did he say about it?

A He said that he was maintaining throughout the investigation by the Department of Corrections and by the Sheriff's

Office that he could not identify the men and then that he would be willing to take a lie detector to substantiate this.

[1153] JOE ESCOBAR, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

[1157] Q Were there any members there -- let me rephrase it.

To your knowledge, did any inmates at Tehachapi become members of the Familia at Tehachapi while you were there?

A Yes.

Q And who were they?

A Richard Montenero, Fred Allen, J. Allen, Freddy Baca.

[1264] THE COURT: All right. You can open the argument, [1265] Mr. McGillivray.

[1279] There are two other alibi witnesses on behalf of Mr. Mata -- Jerry Sanford and a William Joseph Bustillos. They also testified that they saw Mr. Mata playing chess.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent.	)
vs.	)
SALVADOR VARGAS, DAVID GALLEGOS, and ROBERT MATA,	)
Defendants and Appellants.	)

[Filed November 4, 1974)

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNT OF KERN

Honorable P. R. Borton, Judge

RESPONDENT'S BRIEF

[Pg. 9] The photographs in question were available at trial and no objection as to the testimony concerning the pretrial identification was made. Appellants are thus too late to raise such contention on appeal. People v. Welch, 8 Cal.3d 106, 114-115 (1972); People v. Sirhan, 7 Cal.3d 710, 745 (1972).

As long as the photographs from which the witnesses made their identifications are preserved and available at trial, counsel for the accused, by using them in cross-examination of prosecution witnesses, can easily reveal the possibility of prejudice and thereby impugn the identification testimony. The court can, at the same time, examine such photographs and determine for itself if the display of photo was fairly presented. People v. Lawrence, supra, 4 Cal.3d 273, 278-279 (1971).

The procedure to be used in determining whether the photo-identification procedure is impermissibly suggestive is based on the totality of the circumstances of the case. Where, as in the instant case, there is no showing of influence by the investigating officers, the witnesses had an adequate opportunity to view the crime and their descriptions are accurate, the circumstances

indicate the inherent fairness of the procedure. People v. Greene, 34 Cal.App.3d 622, 646-647 (1973).

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT MATA, Petitioner,	)	
vs.	)	No. C-77-2801-SAW
GEORGE SUMNER, Repondent.	)	

[Filed December 9, 1977]

PETITION FOR WRIT OF HABEAS CORPUS

[Pg. 16]

II. PETITIONER IS ILLEGALLY IMPRISONED IN VIOLATION OF HIS RIGHT TO THE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE I, SECTION 13, OF THE CONSTITUTION OF CALIFORNIA, AND BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

A. Appointed counsel failed to motion to suppress the tainted in-court identification testimony of prosecution witnesses Almengor and Allen.

The constitutional right to counsel contemplates "effective aid in the preparation and trial of the case." Powell v. Alabama (1932) 287 U.S. 45, 71 [77 L.Ed. 158, 53 S.Ct. 55].

> "It is counsel's duty to investigate carefully all defenses . . . that may be available to the defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled. . ." People v. Ibarra (1963) 60 C.2d 460, 464 [34 Cal.Rptr. 863, 386 P.2d 487].

The conviction must be reversed where it appears that counsel, through lack of

diligence, was unaware of a rule that is commonplace to an attorney engaged in criminal trials, when such rule is found in standard reference texts and was basic to the case. Ibarra, at 465.

> "Petitioner need not establish that he was entitled to reversal to show prejudice in the denial of counsel. . . A defense is crucial because it . . . might have produced a verdict for the defendant, not because it would have inevitably achieved a favorable result." In Re Smith (1970) 3 Cal.3d 192, 202 [90 Cal.Rptr. 1, 474 P.2d 969]. (Emphasis added.)

In Smith, supra, the California Supreme Court held that the defendant was deprived of the effective aid of appellate counsel in violation of the Sixth and Fourteenth Amendments by the failure [Pg. 17] to raise

certain assignments of error. One such assignment of error was the sufficiency of the in-court identification of the defendant, where the prosecution witness had been unable to positively identify him at a pre-trial police lineup. (Smith, at 200.) On the petition for habeas corpus relief, the Court thereby issued an order to show cause.

Similarly, a crucial defense to petitioner's case arose from the fact that the in-court identification testimony of prosecution witnesses Almengor and Allen was the direct result of constitutionally impermissible pre-trial identification procedures, and therefore inadmissible. Had counsel motioned to suppress their testimony, it would have been inadmissible unless the prosecution could establish by clear and convincing evidence that their in-court identification testimony had an origin independent of the pre-trial identification procedures.

(United States v. Wade (1967) 388 U.S. 218, 240 [18 L.Ed.2d 1149, 87 S.Ct. 1926]; Simmons v. United States, Stovall v. Denno, cited supra; see also People v. Caruso (1968) 68 C.2d 183 at 189-190.) In petitioner's case, it is unlikely that the prosecution could have met this burden of proof. Hence, the damaging and prejudicial testimony of Almengor and Allen would have been inadmissible.

The rule providing for the suppression of identification testimony resulting from impermissibly suggestive pre-trial identification procedures should be common knowledge to an attorney engaged in criminal trials. This defense was established six years prior to Petitioner's trial in the landmark United States Supreme [Pg. 18] Court decision of United States v. Wade, cited supra (see also Simmons, Stovall v. Denno and Caruso, cited supra), and has been discussed

numerous times in appellate opinions, law review articles, and the standard works of reference.

The prosecution's case was greatly dependent on the identification testimony of Almengor and Allen and counsel's failure to motion to suppress their testimony could not therefore have been based on tactics and strategy. Rather, counsel's failure to discover and present this defense resulted in the withdrawal of a crucial defense to Petitioner's case, thus denying him his right to effective counsel and due process of law.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT MATA, Petitioner, vs. GEORGE SUMNER, Repondent.	No. C-77-2801-SAW

[Filed February 28, 1978]

RETURN TO THE ORDER TO SHOW CAUSE AND POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

[Pg. 1] COMES NOW Respondent George Sumner, Warden, and for a return to the order to show

cause filed by this Court on January 19, 1978, states:

I

Respondent acknowledges that petitioner is presently confined in the California State Prison at San Quentin.

II

Petitioner is lawfully so confined pursuant to a valid judgment and commitment of the Superior Court of Kern County rendered in People v. Vargas, Gallegos, and Mata, No. 15771 (July 5, 1973), wherein petitioner was found guilty following a jury trial of violation of California Penal Code section 187 (murder in the first degree), and was sentenced to state prison [Pg. 2] for the term prescribed by law.[1/]

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1. In response to this Court's Order to Show Cause, respondent has lodged herein the state court record, as follows:

clerk's transcript; reporter's transcript of the trial; exhibits 23 and 24

(Footnote continued on next page.)

III

Petitioner was not denied due process by reason of an impermissibly suggestive pretrial identification procedure or by the inadequacy of appellate review of his conviction nor was he denied the right to effective assistance of counsel at his state court trial.

WHEREFORE, respondent respectfully submits that the Order to Show Cause herein be discharged, the petition denied and the proceedings dismissed.

/

/

/

Footnote 1 continued:

which were admitted at trial; the abstract of judgment; appellant's opening brief and respondent's reply brief on the appeal of the conviction, the opinion of the California Court of Appeal, petitioner's petition for writ of habeas corpus to the California Court of Appeal and respondent's opposition to that petition.

DATED: February 28, 1978

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[Pg. 6] ARGUMENT

I

THE IDENTIFICATIONS OF PETITIONER BY INMATES ALLEN AND ALMENGOR WERE PROPERLY ADMITTED THOUGH THEIR ADMISSION WAS HARMLESS IN ANY EVENT.

Petitioner complains that the eyewitness identification of him by two of the three eyewitnesses to the murder, inmates Jay Allen and Rigoberto Almengor, [2/] was admitted

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2. Petitioner does not challenge the admission of Paul Childress' eyewitness identification. Childress testified that he was acquainted with petitioner and co-defendant Gallegos prior to the crime, (RT 268) that he witnessed the crime (RT 275-278) and he made in-court identifications of Mata, Gallegos and Vargas as the assailants (RT 279). Childress' testified that on October 20, 1972, the day after the incident, he reported to Lieutenant Mills what he had witnesses and verbally identified Mata and Gallegos by their know names, "Biggs" and "David" (RT 284-285). Childress testified that he then identified all three defendants' photographs from the Rolodex of pictures of hundreds of inmates (RT 285-286). Lieutenant Mills testified that he isolated the photographs of Mata and Gallegos and Childress confirmed their identify and then again picked their photos from the Rolodex (RT 676-677). Childress testified that he never had any doubt about his identification of the three defendants (RT 286-287).

in violation of his right to due process of law. This identical issue was raised on appeal from petitioner's conviction. The Court of Appeal, a court of competent jurisdiction, determined in a written opinion in a full ad fair hearing that the pretrial identification procedure was not impermissibly suggestive. Accordingly, this determination is presumed correct. 28 U.S.C § 2254(d). Petitioner is not entitled to relief herein unless, upon a review of the pertinent record as a whole, this Court finds that the state court determination that the identification evidence was properly admitted, was clearly erroneous. 28 U.S.C. § 2254(d). Petitioner bears the burden of establishing by convincing evidence, that the state court determination was clearly erroneous. 28 U.S.C. § 2254(d).

[Pg.7] Petitioner relies entirely on the facts contained in the state court records.

We submit that no demonstration has been made, let alone by convincing evidence, that the state court findings are erroneous or that the state fact finding process was deficient in any of the ways specified by 28 U.S.C. § 2254(d).

The facts surrounding the pretrial identifications procedures are as follows:

October 19, 1972

Both Almengor and Allen were questioned the evening of the incident. Almengor identified "Bogus" Pete Nunez to the authorities, a name which was told him by other inmates based upon his description of one of the assailants (RT 399). Almengor was then shown "Bogus" Pete's photograph along with several hundred other photographs of inmates (RT 422, 711, 914). Almengor identified "Bogus" Pete, and tentatively identified defendant Vargas, and inmates Ramirez and Reymundo (RT 734, 915). Almengor testified

that he selected eight photographs as bearing similarities to the assailants (RT 401).

Contrary to petitioner's assertion (Petition p. 7) the record reflects that Allen was not shown any photographs that evening since he asserted that he could not make any identifications (RT 720).

October 27, 1972

Due to prison disturbances, Almengor and Allen were not contacted for the purpose of making identifications until October 27, 1972 (RT 725, 927).

At this time, Allen was shown a group of photographs introduced into evidence as Exhibit 23, and which included the photographs of Mata, Gallegos and Vargas. The names of the inmates were, of course, concealed (RT 720). Allen again [Pg. 8] made no identifications, and complained that the photographs were too old (RT 720-721).

Almengor was also shown the photographs introduced at trial as Exhibit 23

with the names of the inmates concealed (RT 715). Outside Allen's presence, Almengor again tentatively identified the photo of Vargas (RT 437, 721, 959).

Almengor said that he felt that photographs were too old, that appearances might have changed, and he requested up-to-date photographs (RT 716).

October 30, 1972

On October 30, 1972, Allen and Almengor were shown a group of photographs introduced as Exhibit 24, and which included photographs of Mata, Gallegos and Vargas which had been taken between October 27 and 30 (RT 716).

First Almengor was shown the photographs with the inmates' names concealed, and he identified all three defendants (RT 722). Then Allen was brought in, and while Almengor stood on the other side of the room, Allen likewise identified Mata, Gallegos and Vargas as the assailants (RT 722).

Petitioner asserts that Almengor and Allen saw the three defendants being led out of segregation for the new photographs. However, Almengor testified that while he knew Gallegos was being photographed, he did not know Mata and Vargas were with him (RT 444-445). Allen testified at trial that he did not even know Gallegos was being taken out for the photographing (RT 634).

Next, petitioner claims that the only updated photographs included in Exhibit 24, were those of the three defendants. The correctional officers took new photographs of a number of other inmates but none of the photographs came out (RT 716, 754). Nevertheless, the photographs of the other [Pg. 9] inmates included in Exhibit 24 were reproduced to the same size hence they had the same appearance of newness, and were also black and white (RT 716; See Exhibit 24). Accordingly, there was no suggestiveness by

virtue of the fact that defendants' pictures were the only ones presented in updated versions.

Petitioner complains that the photographs tentatively identified by Almengor on October 19, were not included in Exhibit 24. Firstly, this fact has absolutely no bearing on Allen's identification of defendants since he never made a prior identification and was not shown photos on October 19. With respect to Almengor's identification, failure to include those photos does not suggest anything with respect to defendants; if anything, it suggests only that the correctional officers did not consider those inmates (Reymundo, Ramirez and Nunez) as suspects.

Finally, petitioner contends that Exhibit 24 "suggested" that defendants were suspected of committing the crime because their photographs, which were shown on October 27 in Exhibit 23, recurred in

Exhibit 24 and by virtue of that fact, were emphasized.

A comparison of Exhibit 23 and Exhibit 24 does not support petitioner's case of suggestiveness. Almost all of the photographs in both exhibits are of inmates of Mexican descent, with similar facial features, hair style, and clothing. Many of the photographs in Exhibit 24 could be mistaken for updated photographs of inmates included in Exhibit 23. Indeed, petitioner's photograph in Exhibit 24 is very different from his photograph in Exhibit 23. Accordingly, it is not at all obvious that petitioner's photograph was repeated, and we submit a comparison of the exhibits does [Pg. 10] not suggest that petitioner committed the crime, or emphasize him in any way.

Thus, we conclude that the photographic identification was not at all suggestive. However, even if a pre-trial identification procedure is unnecessarily suggestive,

due process does not require its exclusion per se. Rather, reliability is the linchpin in determining the admissibility of identification testimony. Manson v. Brathwaite (1977) ___ U.S. ___; 97 Sup. Ct. 2243, 2253. The factors which must be considered in determining reliability were set out in Neil v. Biggers (1972) 409 U.S. 188, 199-209 and include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. See Manson v. Brathwaite, supra at 2253.

The stabbing took place in a prison dorm in the afternoon (RT 367-377; 586). Both Almengor and Allen were watching the fight and were looking at the defendants (RT 377; 586-587). Both Almengor and Allen were

also attacked by two of the defendants as they tried to held the victim (RT 588-589); petitioner Mata was one of the two attacking defendants and he and Almengor engaged in a fight where a good deal of eye contact was made (RT 379-383). Allen knew petitioner Mata before this incident when he lived in the same dorm as Mata (RT 595). Finally, once an up-to-date photograph of petitioner Mata was shown to Allen and Almengor their identifications which were made within 11 days of the killing were positive and unequivocal (RT 402-404; 596-598).

[Pg. 14] II

PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY VIRTUE OF THE FAILURE TO OBJECT TO HIS IDENTIFICATION BY INMATES ALLEN AND ALMENGOR AS ONE OF THE ASSAILANTS, THOUGH THIS COURT HAS DISCRETION TO DENY RELIEF DUE TO PETITIONER'S FAILURE TO RAISE THIS ISSUE ON APPEAL FROM HIS CONVICTION IN STATE COURT.

At trial, there was no objection to the introduction of the eyewitness identifications of defendants by inmates Almengor,

Allen and Childress. Petitioner Mata asserted on appeal from this conviction that the pre-trial procedures were impermissibly suggestive. There was no claim of ineffective counsel by the failure to object to the admission of this evidence. Nor did the appellate court address this issue; it only ruled that the photographic line up procedure was not suggestive and hence the admission of the identification evidence was proper.

In his petition for writ of habeas corpus in the state appellate court, petitioner raised the issue of effective assistance of counsel for the first time. That petition, which raised the same three issues raised herein, was denied summarily without opinion.

Inasmuch as petitioner did not raise this issue when he could have done so on appeal from his conviction, and since the state court has never ruled on the merits by

virtue of the summary denial of the habeas petition, we submit that the Court has the discretion to deny relief on the basis of the deliberate by-pass of this issue. 28 U.S.C. § 2243; Fay v. Noia (1963) 372 U.S. 391, 438-440; Curry v. Wilson (9th Cir. 1968) 405 F.2d 110, 111-112.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT MATA, Petitioner, vs. GEORGE SUMNER, Repondent.	)	No. C-77-2801-SAW

DECLARATION OF JAMIE JACOBS-MAY

I Jamie Jacobs-May, Deputy Attorney General hereby declare as follows:

Pursuant to the discussion between Court and counsel on April 5, 1976, we are filing this supplement to our return.

In compliance with Rule 5, 28 U.S.C 2254, we state that petitioner has exhausted state remedies.

We invite this Court's attention to the recent decision in Wainwright v. Sykes (1977) 433 U.S. 72, which establishes a

procedural default test to replace the former deliberate bypass test. Sykes holds that when a state prisoner fails to raise a federal claim in a timely fashion, as required by a state's contemporaneous objection rule, the state no longer need show that the omission was a tactical choice, or "deliberate bypass." Instead, federal review is barred "absent a showing of good cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violations." Id. at 84. Thus, petitioner must show actual prejudice with respect to his claim of incompetency of counsel (incompetency of counsel constitutes a showing of good cause), and both good cause and prejudice resulting from his failure to challenge the adequacy of the record before the Court of Appeal at the time that review was made.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 7, 1978, at San Francisco, California.

JAMIE JACOBS-MAY
Deputy Attorney General